IN THE SUPREME COURT OF THE UNITED STATES

_____TERM, 1952

MRS. PAULINE R. BURKS
Petitioner

vs.

COLONIAL LIFE & ACCIDENT INSURANCE COMPANY OF COLUMBIA, SOUTH CAROLINA
Respondent

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Mrs. Pauline R. Burks respectfully petitions that writ of certiorari may issue to the United States Court of Appeals for the Fifth Circuit to bring up the record from and to review the judgment of that court in the case of Mrs. Pauline R. Burks, Appellant, vs. Colonial Life & Accident Insurance Company of Columbia, South Carolina, Appellee, No. 13713, and that said judgment may be reviewed and reversed; and in support of this petition respectfully shows:

STATEMENT OF JURISDICTION AND SUBSTANTIAL QUESTION INVOLVED

This is a civil case and this Court has jurisdiction to entertain this petition and grant the writ of certiorari to the United States Court of Appeals for the Fifth Circuit under Section 1254 (1), Title 28, United States Code Annotated.

The judgment sought to be reviewed and reversed is dated November 30, 1951, and this petition is submitted within the ninety-day period prescribed by Section 2101 (c), Title 28, United States Code Annotated.

The District Court granted the motion of the insurance company for summary judgment on all four counts of the petition, and the Circuit Court of Appeals affirmed the District Court. Both of such opinions are set forth at pages 138-145 of the certified Record from the Fifth Circuit Court of Appeals which accompanies this petition.

The law of the State of Georgia prevails in this case. If there is no Georgia court decision or statutory law controlling the question, then the general law, as determined by the Federal courts, controls the issues of the case.

With respect to Count III of the petition, both the District Court and the Circuit Court of Appeals rendered a decision without Georgia precedent, statutory or otherwise, and undoubtedly contrary to how the courts of Georgia would decide the issues in the light of general Georgia law. Neither Federal court cited or applied any Georgia law in the decisions on this count. The decision of the Circuit Court of Appeals for the Fifth Circuit is in direct conflict with the following decisions of the Circuit Courts of Appeals for the Sixth and Seventh Circuits on the same question:

> *American Life Ins. Co. of Alabama vs. Hutcheson, 109 F. (2d) 424 (6th Cir.) (Certiorari denied 310 U. S. 625; 84. L. Ed. 1397*
> *Behnke et al. vs. Standard Accident Ins. Co. of Detroit, Michigan, 41 F. (2d) 696 (7th Circuit)*

The rule of law controlling this particular count is not embraced in the statutory law of Georgia and has never

been passed upon by the courts of Georgia, so far as is ascertainable, and, therefore, the general law controls this count of the petition.

This is not a case where there is a conflict in the decisions of the Circuit Courts of Appeals because of a conflict in the law of the respective states involved in the different circuits. There is no Georgia law sustaining the decision of the Fifth Circuit Court of Appeals with respect to Count III, although there is some Georgia law indicating to the contrary of such decision.

Moreover, the decision of the Circuit Court of Appeals for the Fifth Circuit with respect to the other three counts of the petition, decided important questions of local law applicable in Georgia, undoubtedly, we believe, in a manner in conflict with applicable Georgia court decisions.

To secure uniformity of decisions among the Circuit Courts of Appeals, certiorari was granted by this Court in:

> *Magnum Import Co. vs. Coty, 262 U. S. 159, 163; 67 L. Ed. 922, 924*
> *Ruhlin vs. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290*

This Court has never passed upon the question of law presented in Count III of the petition so far as can be ascertained. However, this Court did deny certiorari in the case of *American Life Ins. Co. of Alabama vs. Hutcheson*, supra, in which the decision is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in this case.

The Fifth Circuit Court of Appeals in this case decided important questions of local Georgia law in a manner, we believe, in conflict with applicable local Georgia decisions,

justifying the grant of certiorari as contemplated by Rule 38, Par. 5 (b) of this Court.

In addition to the foregoing, the questions involved are substantial, in that this case involves a life and accident insurance company of the State of South Carolina carrying on interstate commerce in the State of Georgia, by and through its general agent for the State of Georgia, in insuring the lives of persons in the State of Georgia. The questions involved and their correct decision by this Court are of wide public interest, and affect property rights throughout the United States.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner, a resident of the State of Georgia, initially brought her petition in three counts in the District Court against Colonial Life & Accident Insurance Company, a resident of the State of South Carolina.

Because the case terminated solely on the pleadings and supporting affidavits, on motion for summary judgment, it will be necessary to set out the allegations of the complaint in some detail.

(a)

Count One

This count is based on the right of recovery by plaintiff on the equitable remedy of specific performance.

In this count petitioner alleges that one G. C. Pool, of Macon, Bibb County, Georgia, was the general agent of the defendant in the State of Georgia, and that all during the times complained of he was acting within the scope of his employment and in furtherance of and the prosecution of the defendant's business; that the said Pool *had full and*

actual authority, as well as apparent authority, to perform all the acts, statements and agreements set out in the complaint by and on behalf of the defendant.

That on November 15, 1949, the said Pool, acting as aforesaid, approached David Halsey Burks, the deceased husband of petitioner, and proposed to the deceased that he buy an accident policy on his life known as "Executive and Professional Accident Insurance," a copy of the same being attached to the complaint as Exhibit A (R., pp. 36 and 49. The policy actually attached did not have the blanks filled in, as page 49 of the Record discloses); that on the same day Pool explained to the deceased that he could pay the premiums for the policy either annually, for $116, or monthly, at the rate of $10 per month; and that the monthly premium payment plan of the company was as follows: The Company had printed, and Pool exhibited the same to the deceased, checks entitled "Premium Payment. 'The Executive and Professional Accident Policy,'" in the amount of $10 each, payable to the defendant company, with the only blanks at all being the date thereof, the name and address of the drawee bank and the signature of the drawer.

That on November 15, 1949, the said deceased *accepted* the proposal of the said Pool and *accepted* the monthly plan of premium payment and signed *twelve of the $10 checks* and gave them to the said Pool, said checks being drawn on the *joint bank account and joint funds* of the deceased and petitioner and *both their names* being signed thereto. A copy of such a check, executed by petitioner and the deceased and payable to the defendant, is attached to the complaint as Exhibit B. (R., p. 37.)

One of the checks was then and there, on November 15, 1949, filled out and completed by the said Pool, as follows: Dated November 15, 1949, drawn on the Commercial

Bank & Trust Company, Griffin, Georgia, the name of the bank where petitioner and deceased had their joint funds; and that the *said Pool agreed then and there* that said check so filled out was payment of the premium on said policy for the period November 15, 1949, to December 15, 1949.

That on said date the form attached to the complaint and marked Exhibit C (R., p. 38) was filled out by the said Pool and signed by the deceased at the request of the said Pool, who stated that the same was a *formality* required by the defendant company. That said form attached as Exhibit C was entitled "Application for Accident Insurance Policy," was not attached to the policy that was issued on the life of the deceased; and if a policy on the life of the deceased had not been executed and issued, then said form would not have been attached to said policy, had it been issued, and therefore, under the law of Georgia, nothing in the "application" could be used as a defense to the suit; neither was any application attached to the type policy herein involved that was issued on the life of any other assured by the defendant; and it was not the policy, practice or custom of the defendant to attach the same to any such policy of any assured; and, therefore, neither the plaintiff nor her deceased husband is bound by any recitals contained in said form, because it was not, nor would have been, attached to the policy of insurance issued or to be issued on the life of the deceased; and, therefore, was not a part of the policy.

That all of said twelve checks, *signed by both the petitioner and the deceased,* were forwarded to the home office of the defendant in Columbia, South Carolina, and received by the defendant on or about November 18, 1949, and accepted and retained by the defendant.

That after the delivery to the said Pool of the said twelve checks, signed jointly by petitioner and the deceased, the

remaining eleven were filled out by the defendant and dated monthly, beginning with December 15, 1949, and ending with October 15, 1950, and with the bank of deceased and petitioner filled in, that is, the Commercial Bank & Trust Company, Griffin, Georgia.

That petitioner is the widow of the deceased and was named as beneficiary in said policy.

That on November 15, 1949, the said Pool advised the deceased, at the time of acceptance of said proposal of insurance, that if the home office cashed his check dated November 15, 1949, it would mean the company had accepted him and his policy would be forthcoming and would be dated November 15, 1949; and petitioner alleges that this was the general practice and custom of the defendant.

That on November 26, 1949, the defendant company, at its home office in Columbia, South Carolina, unqualifiedly and unconditionally, and without reservation or restriction thereon, cashed said check dated November 15, 1949, by depositing the same into the general funds and into the general treasury of the defendant company; that said check was then transmitted in the usual course of banking business, cleared, perforated and paid, and so marked by the Commercial Bank & Trust Company of Griffin, Georgia, on November 30, 1949; and the petitioner's and the deceased's account and funds therein were reduced accordingly on such date.

Prior to his death the deceased ascertained that said check had been so cashed and paid, and was thereby assured that he was covered and protected by said policy.

That the deceased contemplated obtaining other insurance to protect his life against the risk covered by said policy of the defendant in the event he was not accepted by

defendant, but when he ascertained that defendant had accepted him by cashing his said check, he was assured that he was covered against such a risk and forewent obtaining other insurance.

That the defendant, in addition to cashing said check of November 15, 1949, as aforesaid, accepted the other eleven checks as payment of said premium in advance, for the period December 15, 1949, to and including November 14, 1950.

That the deceased was killed on the evening of December 3, 1949, by accidental means, within the meaning of his policy and under Section 2 thereof and, therefore, the company is liable for the amount set forth therein, to-wit: $12,500.

That it was the intention and agreement of the parties that the said policy when issued would take effect as of November 15, 1949.

That by accepting said twelve checks and cashing the one dated November 15, 1949, the defendant company, as stated and agreed by the said Pool, confirmed and ratified the agreement of the said Pool, and, as a matter of law as well as a matter of fact, accepted the deceased for such policy as set forth in Exhibit A, and became obligated to issue and deliver to said deceased such a policy.

That, as a matter of law, in the absence of any agreement or intention, the law would imply the insurance policy, when issued, to be effective on November 26, 1949, the date defendant cashed said check, as aforesaid; and that said policy and contract of insurance was in effect and existing on December 3, 1949, when the deceased met his accidental death, by the intention of the parties and as a matter of law.

That the deceased had done and accomplished all that was required of him to do in the premises to effectuate said insurance; and that the defendant company had in fact executed and issued the policy prior to the death of the deceased, or if it had not executed and issued the policy, it had done all the acts and functions necessary to the issuance of the policy, and all that was left to be done by it was the ministerial function of filling in the blanks in the form of a policy, a copy of which is attached as Exhibit A to the complaint; and that the defendant had many such blank forms.

That the defendant company had in fact executed and issued a policy prior to the death of the deceased; or, if it had not, it would have thereafter done so had death not ensued when it did.

That by its conduct and acts, as set forth hereinbefore, the defendant company *is estopped* to deny the execution and issuance of said policy, and defendant *has waived* any requirement that the policy be executed, issued or delivered during the life and sound health of the deceased.

That it would be a *fraud* upon petitioner and her deceased husband to permit the defendant company to appropriate and convert to its own use said funds, as it did when it cashed said check dated November 15, 1949, and not be responsible and liable to her for the amounts sued for.

That petitioner is entitled to a decree of specific performance and have the court, under its equitable powers and jurisdiction, consider "that done which should have been done," and decree the policy, as attached as Exhibit A, as executed, issued and delivered and of full force and effect on the life of said deceased at the time of his death, and have the court award judgment against said defendant, based on said policy, in the amount sued for.

That proof of claim and demand was made on defendant company by petitioner and denied, and the failure to pay the same was in bad faith under the Georgia law, entitling petitioner to the statutory penalty and attorney's fees.

The prayer for specific performance was "That this court declare, adjudge and decree the 'Executive and Professional Accident policy,' copy of which is hereto attached and marked 'Exihit A,' to have been consummated on the life of David Halsey Burks prior to his death on December 3, 1949, and of full force and effect on the said David Halsey Burks prior to and at the time of his death."

(b)

Count Two

This count is grounded on the legal remedy of breach of promise to insure and damages therefor.

This count alleges the identical facts as set forth in Count One, with the additional allegations:

That by virtue of the alleged foregoing facts (the same as set forth in Count One hereinbefore), defendant became obligated under said intention and agreement to deliver to said deceased said policy, dated November 15, 1949, to be effective as of November 15, 1949, and having failed to do so, breached its said obligation and agreement, and is responsible in damages therefor to petitioner.

That by virtue of the foregoing, the defendant company became obligated under the law to deliver to said deceased said policy, dated November 26, 1949, the date it cashed said check and converted the funds derived therefrom to defendant's own use, and having failed to do so, has breached its said obligation and is responsible in damages therefor to the petitioner.

The prayer was for $12,500 damages and attorney's fees.

(c)

Count Three

This count is grounded on negligence of the defendant for unreasonable delay and failure to execute and deliver the policy for an unreasonable time, or for unreasonable delay and failure to notify plaintiff or her deceased husband of a rejection, if such was the case, so that insurance to cover the same risk could be obtained elsewhere, as was contemplated in the event of a rejection.

This count likewise sets forth the same allegations as Count One, with the additional allegations:

That neither she nor the deceased was notified by the defendant that said policy was not in force prior to December 3, 1949.

That, under the circumstances, a reasonable time had expired prior to December 3, 1949, for defendant to notify the deceased that he was not accepted, if such were the fact. That the defendant company gave every indication that the deceased had been accepted and was insured prior to his death, and led the deceased and petitioner to believe that the deceased was accepted and that the policy was of full force and effect prior to the death of the deceased.

That the defendant was negligent in not notifying deceased within a reasonable time that he was not accepted for said policy, if such were the case, and that the defendant company had ample time between November 15 and December 3 to so notify the deceased or plaintiff.

That the defendant company was negligent in failing to notify the deceased that he was not covered by said policy

prior to his death, so that he could have acquired other insurance to protect him against the risk.

The specifications of negligence were that the defendant was negligent:

"(a) In failing to give notice within a reasonable time and before the expiration of a reasonable time that the policy was not of force on the life of said deceased.

"(b) In giving the impression, by the statement of its agent and by the acts and conduct of its agent and the defendant itself, as aforesaid, at its home office, that said policy was of full force and effect.

"(c) In giving the impression that said policy was of full force and effect, by accepting said twelve checks and cashing the one of November 15, 1949, as a foresaid, and appropriating to its own use the funds derived therefrom.

"(d) In failing to notify said deceased within a reasonable time that the insurance involved was not in force, so that he could have bought insurance to protect against the same risk elsewhere.

"(e) In not delivering to said deceased said policy prior to the death of the deceased, which would be of full force and effect and binding on the defendant at the time of the death of the deceased.

"(f) In advising deceased, by and through its duly authorized agent, that if said check of November 15, 1949, were cashed by the home office, then said policy would be of full force and effect from the date of the check, and then not delivering said policy accordingly."

(d)

Count Four (Added by Amendment)

This count is based on the legal remedy of reformation and was filed as an amendment to petitioner's original complaint, when it was first ascertained that the defendant company admitted accepting the deceased for a policy and had actually issued and executed a policy on December 5, 1949, the same as the one sued on. This information was obtained in response to petitioner's notice to produce after the filing of the 3 count petition.

The allegations of this count are practically identical with the allegations in Count One, with the allegations adjusted to the fact that a policy of insurance was actually executed and issued by the defendant company and dated December 5, 1949, and set forth other facts, admitted by the defendant in its response to petitioners' notice to produce as follows:

(1) That the "Application for Accident Insurance Policy" attached to plaintiff's complaint as Exhibit C was received at the defendant's home office on November 21, 1949. (R. pp. 83, 84.)

(2) That the application (R., 83,84) was unconditionally and unqualifiedly accepted in writing by the company on November 30 or December 1, 1949 (R., p 76)

(3) That the exhibit attached to the affidavit marked "Exhibit 1-A," was a carbon paper impression made from making out the envelope "in which the policy would have been mailed to Mr. Burks had his death not intervened." (R., p. 87)

(4) That the policy sued on was actually issued and executed on December 5, 1949, but was not delivered to

the deceased because the company on December 5, 1949, learned of his death. (R., p. 87)

(5) An identical copy of the policy the defendant company actually executed and issued (R., p. 49), which the company dated December 5, 1949.

(6) That the policy issued and dated December 5, 1949, was the policy applied for; it did not have attached to it the application and had no provision at all referring to issuance or delivery as a condition precedent to its becoming effective and binding; and that had the policy been issued on November 30 or December 1, 1949, the date of the acceptance of the application, the application would not have been attached, nor would the policy have had in it any provision requiring issuance or delivery during the lifetime of the applicant. (R., p. 88)

This count further alleges:

That under the facts hereinbefore set out, and under the law in such cases, the effective date of said policy and the date the deceased became insured thereby was November 15, 1949, as stipulated, fixed and agreed by the said Pool; and by virtue of the acceptance of said application and cashing of said check, said policy should be so reformed, and petitioner should have judgment on said policy as herein prayed; or the effective date of said policy, and the date the deceased became insured thereby, be established not later than December 1, 1949, the date said application was unconditionally accepted by the defendant, the defendant having theretofore cashed the check of November 15, 1949.

That after the acceptance of said application, which was admitted to be not later than December 1, 1949, the only remaining act the defendant had to do to execute and issue said policy was to have a clerk or stenographer fill in approximately eleven blanks on its printed form, all of which were ministerial acts.

That defendant had on said date of acceptance of the application, not later than December 1, many blank forms of said policy, and it was the company's practice and procedure, after the acceptance of an application, to forthwith and without further acts or doings have said blanks filled in said policy and immediately mailed to the insured.

That such policy actually executed and issued did not have the application attached to it, and, consequently, no part of the application is concerned herein, and no limitation, restriction or provision set forth in the application may be used in evidence or otherwise by the defendant herein as a defense to this count.

That said policy should be reformed so that its effective date will read, and said policy be declared, in full force and effect as insuring the life of the deceased on one of the following dates: November 15, 1949, or December 1, 1949.

The prayer for reformation was:

> "That said policy of insurance dated December 5, 1949, be reformed so that the effective date thereof will be either November 15, 1949, or November 30, or December 1, 1949, and said policy be declared and adjudged in full force and effect on the life of the deceased at the time of his death, on December 3, 1949."

Judgment in the sum of $12,500, as provided in said policy, was prayed for, together with statutory penalty and attorney's fees.

WHY THIS COURT SHOULD EXERCISE ITS JURISDICTION TO GRANT CERTIORARI

Statutory Provision Conferring Jurisdiction

Section 1254 (1), Title 28, U. S. Code Annotated,

establishes the jurisdiction of this Court to grant the writ of certiorari to the Fifth Circuit Court of Appeals.

Grant of Writ Because of Conflict of Decisions Among the Circuit Courts of Appeals

A decision of one Circuit Court of Appeals in conflict with the decision of another Circuit Court of Appeals on the same matter presents a special and important reason for the grant of the writ, so that uniformity of decisions among the Circuit Courts of Appeals may be secured.

Supreme Court Rule 38, Par. 5 (b)

Magnum Import Co. vs. Coty, supra

Ruhlin vs. New York Life Ins. Co., supra

Grant of Writ Because Decision of Fifth Circuit Court of Appeals Decided an Important Question of Local Law in Conflict with Applicable Local Decisions

A decision of the Circuit Court of Appeals on important questions of local law in a way probably in conflict with applicable local decisions is another special and important reason which will be considered by this Court on petition for writ of certiorari.

Supreme Court Rule 38, Par. 5 (b)

Petitioner contends the decision of the Court of Appeals for the Fifth Circuit is in conflict with decisions of other Circuit Courts of Appeals on the same matter and decides questions of local Georgia law probably in conflict with applicable local Georgia decisions.

THE QUESTIONS PRESENTED AND REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Questions Presented

In dealing with the entire case and all four counts of

the petition, the Circuit Court of Appeals stated:

> "Upon our consideration of the claims of error urged upon this appeal our conclusions both as to the controlling issues involved in Counts I, II and IV of the complaint, and as to the decisions of the Court of Appeals and the Supreme Court of Georgia which in point and principle control the decisions of such issues adversely to the contentions of the appellant coincide in all material respects with those expressed by the Trial Court. There is consequently no necessity for any other or further exposition why the judgment of the trial Court upon these counts is correct. However, as to that portion of the opinion discussing the ruling upon the merits of the Third Count of the petition we refrain from any expression of approval or disapproval, since we find this to be unnecessary in the present case. The allegations of this count of the complaint, together with the facts, when considered in the light of the law already held properly applicable to the transaction now under review, are necessarily confined in material substance to the claim of negligence in failing to act with reasonable promptness in either accepting or rejecting the application and in notifying the plaintiff of its action. While we fully recognize and give obedience to the fundamental principal that the existence of negligence and the determination of what constitutes a 'reasonable time' are generally for determination as questions of fact upon consideration of pertinent circumstances, we are nevertheless of the firm opinion that under the precise facts and circumstances of this case a finding of negligence based upon reasonable delay would not be legally supportable. *The minds of reasonable men could not differ on these facts. We are therefore not required to determine, or to express it more accurately, declare, the law of Georgia which would be applicable if a factual basis for such*

> *finding existed. The Georgia Courts do not appear to have passed upon the question* and, since we find at the beginning of our consideration of it the existence of an insurmountable bar to any recovery by the complainant a discussion of the legal merits, otherwise, of this claim could be only academic." (Emphasis supplied.)

The first question presented is whether the Circuit Court of Appeals after conceding there was no applicable Georgia precedent concerning Count III (unreasonable delay count), was correct in holding that "The minds of reasonable men could not differ on these facts"; thereby holding that this count presented no factual issue for a jury to pass upon. This holding is in direct conflict with two Circuit Courts of Appeals decisions mentioned heretofore, and in direct conflict with numerous other state court decisions on the same question. It is believed by petitioner that the "insurmountable bar" referred to by the Fifth Circuit Court of Appeals has no bearing whatsoever on this count.

The "insurmountable bar" referred to could only be that portion of the application (R. p. 39) which states:

> "I further agree that this insurance shall not be in force until the application is accepted and policy issued by the company nor until policy is delivered to and accepted by the applicant while in sound health and free from injury."

Because no policy of insurance was actually issued and delivered to and accepted by the deceased while in life, the Fifth Circuit Court of Appeals, in adopting the trial court's decision with respect thereto, held that Counts I, II and IV were without merit.

The second question is whether the Fifth Circuit Court of Appeals in so holding decided this phase of the case contrary to applicable Georgia State court decisions.

Reasons Relied On For Allowance of Writ

With respect to Count III, the Fifth Circuit Court of Appeals did not express "approval or disapproval" of the District Court's decision. In conceding there was no Georgia law or decision on the question involved, the Circuit Court of Appeals did not attempt to ascertain what the Georgia courts might hold on the facts presented, as this Court held was vital in *Ruhlin vs. New York Life Insurance Co., supra.* The Circuit Court of Appeals determined this count contrary to decisions of two other Circuit Courts of Appeals and contrary to many decisions of numerous state courts. The Circuit Court of Appeals unquestionably was influenced in its determination of this count by the "insurmountable bar" referred to in its opinion, which was undoubtedly the above-quoted part from the application (R. p. 39) ; whereas, the law appears conclusively to be that the provision in an application requiring delivery of the policy during life and sound health of the applicant places an *additional burden* on the insurance company not to unreasonably delay the processing of the application, and certainly can be no defense to this count.

It is contended the Circuit Court of Appeals' decision on this count is contrary to the decision thereon that would be rendered by the Georgia courts.

It was admitted that:

(1) The application was unconditionally accepted two days before the applicant's death. (R., p. 76)

(2) The applicant's check for the first premium was cashed approximately a week before his death, and the

proceeds thereof covered into its general treasury by the defendant (R., p. 84).

(3) Because of the procedural routine in the defendant's policy-issuing office, no policy was actually issued until two days after the death of the deceased. (R., p. 84)

(4) The policy actually issued two days after the death of the applicant, did not have attached to it the application, nor did the policy itself have any provision such as contained in the application to the effect that delivery and acceptance was necessary; and that had the policy been issued prior to the death of the applicant, the application would not have been attached, and the policy itself would have contained no provision requiring delivery or acceptance. (R., p. 88.)

Petitioner feels confident that under the law of Georgia and the admitted facts above set forth, the Circuit Court of Appeals erred in its judgment on Counts I, II and IV.

Petitioner respectfully submits that the law of Georgia is that no delivery or acceptance of a policy is required unless so provided in the contract; and that no application, nor any part thereof, which is not attached to the policy may be used in defense of any action in any controversy between the *parties to or interested in the policy;* and that such a non-attached application can never be considered as a part of the *policy or contract* between the parties.

Petitioner contends that under the law of Georgia, where the application was unconditionally accepted two days prior to the applicant's death, and since there was nothing more for the applicant to do to effectuate the binding force of the contract, and since nothing remained for the insurance company to do except to fill in blanks on its policy form and countersign the policy and mail the policy to applicant

(and since the application would not have been attached to the policy if issued and executed when the application was approved, two days prior to the applicant's death), petitioner is entitled to have the contract specifically performed and declared of force and effect the date of the unconditional approval of the application, two days prior to her husband's death, with the application unattached.

Petitioner also contends, under these facts and the Georgia law, that she is entitled to have the policy, which was actually executed issued and dated two days subsequent to her husband's death, reformed and declared dated and of full force and effect the date the application was unconditionally accepted, two days prior to her husband's death.

Petitioner contends that if the defendant company could cash and cover into its general treasury one of the twelve monthly premium checks accepted by it from the applicant, approve the application and delay the issuance of the policy for four days, and not be liable for death ensuing two days prior to the issuance of the policy, but two days subsequent to the unconditional acceptance of the risk, then the defendant company could have cashed all twelve premium checks and delayed the issuance of the policy for 365 days, though the application was unconditionally approved approximately a week after the cashing of the first check, and not be liable for death ensuing two days before the expiration of the 365 days. The principle, in law, is the same for four days or 365 days.

It is also respectfully contended that the Circuit Court of Appeals erred in its judgment with respect to Counts I, II and IV in deciding that the facts set forth therein did not present a jury question under the law of Georgia, with respect to the following matters:

(1) Whether the defendant company *waived* the pro-

visions of issuance and delivery of policy required in the application by its own acts and the acts and oral agreements of its General Agent for the State of Georgia.

(2) Whether the defendant was *estopped* from urging the defense based on such provisions of the application because of the acts and oral agreements and knowledge of its General Agent and because of its own acts.

This petition is accompanied by a certified transcript of the record in the Circuit Court of Appeals for the Fifth Circuit, including the proceedings in that court in this matter, and ten additional copies thereof. A supporting brief follows hereafter.

WHEREFORE, Petitioner prays that a writ of certiorari be issued and directed to the United States Court of Appeals for the Fifth Circuit to bring up the record in this case, and that the decision of that court be reviewed and reversed.

This _____ day of February, 1952.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES

No._____

MRS. PAULINE R. BURKS

Petitioner

vs.

COLONIAL LIFE & ACCIDENT INSURANCE COMPANY OF COLUMBIA, SOUTH CAROLINA

Respondent

Brief in Support of Petition for Certiorari

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IN THE SUPREME COURT OF
THE UNITED STATES

No._____

MRS. PAULINE R. BURKS
Petitioner

vs.

COLONIAL LIFE & ACCIDENT INSURANCE
COMPANY
Respondent

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

PRELIMINARY STATEMENT

This case terminated adversely to petitioner herein in the District Court for the Middle District of Georgia upon grant of motion for summary judgment filed by the repondent herein. The United States Circuit Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. The Circuit Court of Appeals' affirming decision is reported in the official reports as follows:

Burks vs. Colonial Life & Accident Insurance Co., No. 13713; 192 F. (2d) 643.

STATEMENT OF JURISDICTIONAL GROUNDS INVOKED

This Court has jurisdiction to grant the writ of certiorari applied for in this case.

Sect. 1254 (1), Title 28, U.S.C.A.

Rule of Supreme Court

Rule 38, Par 5 (b) of this Court sets forth that a petition for writ of certiorari may be considered and granted by this Court in a case where a Circuit Court of Appeals rendered a decision in conflict with decisions of other Circuit Courts of Appeals on the same matter, or where the Circuit Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

It is respectfully submitted that the Circuit Court of Appeals for the Fifth Circuit in its decision in this case rendered a judgment in conflict with that of other Circuit Courts of Appeals on the same subject matter and decided important questions of local Georgia law contrary to applicable Georgia decisions.

Decisions of This Court

The following decisions of this Court hold that the grant of writ of certiorari is proper to secure uniformity of decisions among the Circuit Courts:

Magnum Import Co. vs. Coty, 262 U.S. 159, 163, 67 L. Ed. 922, 924

Ruhlin vs. New York Life Ins. Co., 304 U.S. 202, 82 L. Ed. 1290

STATEMENT OF THE CASE

This case terminated on the plaintiff's petition in the District Court on grant of motion for summary judgment and supporting affidavits filed by the defendant therein; and the Circuit Court of Appeals affirmed the judgment of the District Court.

For fear of being burdensome, we shall not repeat here

the allegations and prayers of the four-count petition nor the facts set forth in the motion for summary judgment and supporting affidavits, all of which are set forth in the attached and foregoing petition for certiorari (Pet. Cert. pp. 4-15 and pp. 19-20)

SPECIFICATIONS OF ASSIGNED ERRORS

It is respectfully contended that the Circuit Court of Appeals erred in holding:

As to Count I

(a) That the oral agreements and promises made by and between the deceased and the company's General Agent for the State of Georgia were unenforceable, and that all such agreements and promises merged into and were rendered nugatory by the written application.

(b) That the provision of the written application controlled where contradictory to such oral agreements and promises made by and between the company's general agent and the deceased.

(c) That the provision in the application concerning issuance and delivery of the policy during the life and sound health of the applicant was not waived, nor was the defendant estopped from insisting on it as a defense, by virtue of the oral agreements and promises of its general agent, his acceptance and retention of twelve premium payment checks, the later acceptance and retention of the twelve premium payment checks and the cashing of the one dated November 15, 1949, by the defendant's home office, and the unconditional and unqualified acceptance of the application on December 1, 1949.

(d) That the agreement to insure was not complete when the offer (the application) was unconditionally and unqualifiedly accepted on December 1, 1949.

(e) That this count set forth no issue for determination by a jury.

As to Count II

(a) That the oral agreements and promises made by and between the deceased and the company's General Agent for the State of Georgia were unenforceable, and that all such agreements and promises merged into and were rendered nugatory by the written application.

(b) That the provision of the written application controlled where contradictory to such oral agreements and promises made by and between the company's general agent and the deceased.

(c) That the provision in the application concerning issuance and delivery of the policy during the life and sound health of the applicant was not waived, nor was the defendant estopped from insisting on it as a defense, by virtue of the oral agreements and promises of its general agent, his acceptance and retention of twelve premium payment checks, the later acceptance and retention of the twelve premium payment checks and the cashing of the one dated November 15, 1949, by the defendant's home office, and the unconditional and unqualified acceptance of the application on December 1, 1949.

(d) That the agreement to insure was not complete when the offer (the application) was unconditionally and unqualifiedly accepted on December 1, 1949.

(e) That this count set forth no issue for determination by a jury.

As to Count III

(a) That the requirement of issuance and delivery of the policy in the application was a bar or was a defense in any respect to a right of recovery by petitioner.

(b) That, as a matter of law, although questions of diligence, negligence and what is a "reasonable time" are generally questions of fact for a jury determination, "minds of reasonable men could not differ on these facts."

(c) Indirectly, that the judgment of the District Court was correct which held that petitioner could not maintain this count in her own individual name, but if the same was maintainable at all, it should be brought in the name of the personal representative of the deceased; and that no action would lie in the name of the personal representative of the deceased, because such an action would be personal to the deceased and died with him.

(d) That this count set forth no issue for a determination by a jury.

As to Count IV

(a) That the provision in the application requiring issuance and delivery of the policy during the lifetime and good health of the applicant was a defense to this count.

(b) That the provision in the application requiring issuance and delivery of the policy during the lifetime and sound health of the applicant was a conclusive bar to right of recovery in this count.

(c) That the ministerial duty of filling in blank spaces on the policy form after the death of the applicant, pursuant to the official, unqualified and unconditional acceptance of the application prior to his death, could not be considered at all.

(d) That the agreement to insure was not completed when the offer (application) was unqualifiedly and unconditionally accepted on December 1, 1949.

(e) That petitioner was not entitled to reformation of the policy actually issued as prayed for in this count.

ARGUMENT

Preliminary Summary

This Court should take jurisdiction of this case and grant the writ of certiorari because the Circuit Court of Appeals has decided a very important question of Georgia law which has never been passed upon by the courts of Georgia, and the Circuit Court of Appeals has decided such question without any effort whatsoever on its part to ascertain how the court of Georgia might decide the question. Moreover, the Circuit Court of Appeals decided this question contrary to decisions of two other Circuit Courts of Appeals on the same question. This is with respect to Count III of the petition, and the principal question here is whether the facts alleged present a factual question of unreasonable delay on the part of the insurance company in accepting or rejecting the application of petitioner's deceased husband and notifying petitioner and her husband accordingly.

With respect to Counts I, II and IV, the Circuit Court of Appeals decided the questions presented therein contrary to applicable Georgia appellate court decisions.

The principal questions in these three counts are:

(a) Did all the oral promises, representations and agreements of the defendant's General Agent for the State of Georgia merge into the written application? We contend the answer is no.

(b) Did the facts alleged (assuming them to be true, as we must on motion for summary judgment) concerning the promises, representations and agreements of the general agent of the defendant, the cashing of the first premium check and the unqualified acceptance of the application by the defendant company on December 1, 1949, constitute a waiver of, or estop the defendant company from insisting

on, contrary provisions appearing in the written application? We contend the answer is yes.

(c)

(1) Did the unqualified acceptance of the application on December 1, 1949, disregarding entirely the allegations of oral promises, representations and agreements of the general agent, together with the prior cashing of the first premium check, entitle applicant and petitioner on December 1, 1949, to the policy applied for? We contend the answer is yes.

(2) If petitioner and her husband were entitled to the policy on December 1, 1949 (it being admitted that the application would not have been attached and that no provision would have been in the policy requiring the issuance or delivery as a condition precedent to the binding effect of the policy), was the issuance or delivery necessary to bind the company for the risk commencing on December 1, 1949? We contend the answer is no.

(3) If petitioner and her husband were entitled to the policy on December 1, 1949, with no application attached and with no provisions therein requiring the issuance or delivery of the policy as a condition precedent to its binding effect, is petitioner entitled to have the policy actually issued and dated December 5, 1949, reformed tothe date of entitlement thereof, that is, December 1, 1949? We contend the answer is yes.

If our answers to questions (a) or (b) above are correct, necessarily a factual question is presented, and the Circuit Court of Appeals erred in holding otherwise.

If our answers to questions (c) (1), (2) and (3) are correct, it necessarily follows that the Circuit Court of Appeals erred in its decision and that this Court should not remand

the case back to the Circuit Court of Appeals for it to determine for itself how the courts of Georgia would decide the questions presented in Count III, but this Court should direct that judgment be rendered in favor of petitioner on her motion for summary judgment. (R., p. 111)

Counts I, II and IV

We shall present these counts together, for it is believed that such presentation will dispense with repetitious argument and citation of authority.

The defendant's General Agent for the State of Georgia represented to petitioner's husband that the written application was a formality required by the company. He further represented and agreed with petitioner and her husband that if the company cashed their first premium payment check, the check being signed by both petitioner and her deceased husband, such check having printed on it "Premium Payment—The Executive and Professional Policy", then the policy would be forthcoming and would be dated and of force and effect on November 15, 1949, the date of the first premium check signed by both petitioner and her husband on their joint banking account. The check was cashed on November 25, 1949, by the defendant's home office, and petitioner and her husband ascertained this fact on November 29, 1949, and forewent obtaining other contemplated insurance to cover the same risk. The husband died as a result of an accident within the provisions of the policy applied for on December 3, 1949.

There was no notice of any limitation of the authority of the defendant's general agent in the application, or otherwise, to petitioner or her husband; and it was alleged that the general agent had actual as well as apparent authority to make the representations and agreements on behalf of and to bind the company therefor.

"The agent's authority shall be construed to include all necessary and usual means of effectually executing it. Private instructions or limitations not known to persons dealing with a general agent shall not affect them."

Sect. 4-301, 1933 Code of Georgia Annotated

Limitation of authority on the general agent unknown to persons dealing with them will not bind them.

Armour & Co. vs. Ross & Barfield, 110 Ga. 403

Under the law of Georgia, and under the allegations of the complaint, General Agent Pool had authority to bind the company the same as its president, and, consequently, had authority to bind the company in his agreement with the deceased as to when the insurance was to become effective.

"One who solicits insurance, and represents the company in conducting the negotiations which lead up to the execution of the contract and subsequently in the delivery of the contract itself, is the general agent of the company, with reference to that particular contract. Relatively to it, he is as much the alter ego of the company as any other corporate officer."

German-American Life Assn. vs. Farley, 102 Ga. 720, 735

Progressive Life Ins. Co. vs. Bohannon, 74 Ga. App. 617 (3)

This is the same rule as laid down by this Court as follows:

"No company can be allowed to employ another as its agent and then disavow responsibility for his acts. . .

"The law is equally plain, that special instructions limiting the authority of a *general agent*, whose powers would otherwise be coextensive with the business entrusted to him, must be communicated to the party with whom he deals, or the principal will be bound to the same extent as though such special instructions were not given. Were the law otherwise, the door would be open to the commission of gross frauds. Good faith requires that the principal should be held by the acts of one whom he has publicly clothed with apparent authority to bind him." (Emphasis ours.)

Insurance Co. vs. McCain, 96 U.S. 84, 86

This rule was followed and applied in *Lumbermen's Mutual Ins. vs. Slide Rule Co. (and vice versa), 177 F. (2d) 305 (7th Cir.)*

On the authority of an insurance agent "to solicit and forward applications for policies of insurance," to bind his company, contrary to his actual authority, *on a matter contrary to that as written in the application itself*, an early Georgia Supreme Court case, which is still the Georgia law, held:

"Where soliciting and forwarding applications for policies of insurance was withinthe scope of the duties of an agent of an insurance company, and such agent undertook to prepare for another an application for insurance and wilfully inserted therein a false answer to a material question, he will be regarded in so doing as the agent of the company and not of the applicant, and the agent's knowledge of the falsity of the answer will be imputed to the company." *Clubb vs. The American Accident Company of Louisville, Ky. (and vice versa) 97 Ga. 502*

In deciding that case, the Supreme Court of Georgia

followed and quoted at length from the case of *Insurance Co. vs. Wilkinson, 80 U.S. 222,* part of which follows:

> "The agents are stimulated by letters and instructions to activity in procuring contracts, and the party who is in this manner induced to take out a policy, rarely sees or knows anything about the company or its officers by whom it is issued, but looks to and relies upon the agent who has persuaded him to effect insurance as the full and complete representative of the company, in all that is said or done in making the contract. Has he not a right to so regard him? . . . . . But to apply such a doctrine in its full force to the system of selling policies through agents, which we have described, would be a snare and a delusion, leading, as it has done in numerous instances, to the grossest frauds, of which the insurance companies receive the benefits, and the parties supposing themselves insured are the victims."

No knowledge of any limitation on the authority of the company's general agent was brought to the attention of petitioner or her husband; but even if there had been such notice or knowledge, the acts and representations of the defendant's general agent, made before the issuance of the policy, would, under the law of Georgia, constitute a waiver of any provision in the *application or policy* that was to the contrary, and the company would be estopped to urge the same as a defense.

This is the often-announced law in Georgia.

> "Where a policy of fire insurance contained a stipulation that it should be void 'if the subject of insurance be a building on ground not owned by the insured in fee simple' *but at the time the application for insurance was made the company,* through its agent, knew that the applicant did not own the land on which

the building sought to be insured was situated, it will not be heard, in defense to an action on the policy, to set up the non-compliance of the plaintiff with this condition of the contract.

". . . . It will be seen that the controlling question for decision is whether, under the allegations of the petition as amended, the defendant, by reason of the knowledge of its agent as to the real character of the plaintiff's ownership of the property, is estopped to defend on the ground of the plaintiff's non-compliance, with the conditions of the contract of insurance, or whether the plaintiff, by accepting the policy on those conditions, and with notice of the limitation on the power of the agent to make a waiver for the company, is precluded from recovering on the policy. There is no principle of law more firmly established than that, in general, the knowledge of an agent as to a material fact bearing upon the validity of a contract made on behalf of his principal is imputable to the principal; and this principle has uniformly been applied by our courts in actions on contracts of insurance. . . . Here the insured made written application for a policy of fire insurance. Upon being asked the question as to the character of his ownership of the property, he frankly informed the agent with whom he was dealing that he owned the building but did not own the land. There is no intimation in the petition that the insured was on notice, before receiving the policy, that the agent had no power to write the insurance with the title to the property held as it was. There is nothing from which an inference can be drawn that the agent and the insured colluded to defraud the insurance company by concealing the truth as to the ownership of the property. . . .

". . . . . One of the rules of the company is

that insurance will not be issued upon a building situated on land not owned by applicant. But the company, through its agent knows that the applicant owns the building which he wishes to have insured, but does not own the land on which it is situated and with this knowledge nevertheless issues a policy on the building. Certainly, after leading the applicant to believe that he would be protected, and receiving from him the premiums charged for the insurance, it should not in good conscience be heard to set up, in defense to an action on the policy, that the ownership of the building and of the land were in different persons. True, the policy states on its face that no agent has the power to waive any of the conditions of the policy, and that none of them will be deemed to have been waived unless such waiver is attached to or endorsed upon the policy in writing. But this is not a question of waiver, so much as of notice and estoppel. The agent's knowledge, as has been seen, is the company's knowledge. In spite of the assertion in the policy that the contract shall be void if the ownership of the property is of a given character, the policy has been issued with notice to the company that the ownership is of that character. Regardless of any question of waiver, then, the company has placed itself in a position where it would be inequitable to allow it to make the defense which it seeks. 'Waiver is sometimes the express abandonment of a right. More frequently it is implied from acts that are inconsistent with its continued assertion. . Estoppel is the shield of justice interposed for the protection of those who have not been wise or strong enough to protect themselves. It is the special grace of the court, authorized and permitted to preserve equities that would otherwise be sacrificed to cunning and fraud."

Johnson vs. Aetna Insurance Co., 123 Ga. 404, 406, 407, 410

This last cited Georgia case reviews practically every case in Georgia on the subject and announces that the rule in the following early Georgia case is the proper rule in Georgia, and all decisions to the contrary were overruled.

The early Georgia case so followed held:

> "Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent and are waived if so intended, although they remain in the policy when delivered; a limitation therein upon the authority of the agent to waive such conditions otherwise than in writing attached to or endorsed upon the policy are treated as referring to waivers made subsequently to the issuance of the policy."

Mechanics, etc. Ins. Co. vs. Mutual Real Estate, etc. Assn., 98 Ga. 262

We can see no distinction between the facts in the case of *Johnson vs. Aetna Ins. Co., supra,* cited above and the facts in the instant case. In both cases the agent had knowledge of the full facts. The knowledge of the agent is the knowledge of the principal, and with this knowledge money was accepted and the application itself was accepted; and, therefore, the company has waived, or is estopped to insist on, provisions in the written application that are contrary to the agreements and representations made by the agent.

> "Where a member of a mutual insurance company fails to meet the assessments made upon him, but subsequently transmits to the secretary thereof an amount

of money in payment of all dues then demanded of him, which sum the company retains until after his death without notifying him whether it was satisfactory or not, such action was a waiver of the default and restored him to membership."

Georgia Masonic Mutual Ins. Co. vs. Gibson, 52 Ga. 640 (3)

In a later Georgia decision the same rule was applied, that is, an agent can waive provisions in a written application or policy and the company is estopped to insist on the same; and in that later Georgia case the agent was not a general agent, as in the instant case.

Metropolitan Life Ins. Co. vs. Hale, 177 Ga. 632

The District Court, affirmed by the Circuit Court of Appeals, in holding that the representations and agreements made by the general agent of the company were of no avail to the petitioner in that all such representations and agreements merged into the written application, said:

"All previous negotiations are merged therein and no oral representations may be relied upon to vary its terms. Mitchiner vs. Union Central Life Ins. Co., 185 Ga. 194; Wheeler vs. Fidelity & Casualty Co., 129 Ga. 237."

(Ctf. Rec., p. 141, Footnote)

Neither of these Georgia cases cited by the District Court dealt with an application and *in neither was the contention of waiver or estoppel involved.*

However, in an insurance case similar to the instant case where the point of estoppel and waiver was involved, the appellate courts of Georgia, recognizing that the rule set

forth in these two cases cited by the District Court was not in point, stated:

> "The defendant (the insurance company) relies on *Fowler vs. Preferred Accident Ins. Co., 100 Ga. 300; Life & Cas. Co. of Tenn. vs. Williams., 200 Ga. 273; MITCHINER VS. UNION CENTRAL LIFE INS. CO., 185 Ga. 194.* . . . We have considered all of these cases and do not think that they require a different holding in the instant case."
>
> *American Life Ins. Co. of Ala. vs. Stone, 78 Ga. App. 98-103.*

As we view the decision of the District Court in this case, affirmed as to counts I, II and IV, by the Circuit Court of Appeals without elaboration, it completely overlooks the law of Georgia that an agent for an insurance company can, by his agreements, acts and representations, waive written provisions in an application for insurance or the policy itself, made prior to the issuance of the policy, as in the instant case; the rule being that the notice, knowledge and agreements made by the agent are imputed to the company, and that with such knowledge, if the company accepts the application or accepts money from the applicant for the insurance, the company waives such written provisions and is estopped to insist on them.

This rule of waiver and estoppel is recognized elsewhere.

> "If a casualty insurance agent exceeded his authority in *fixing the date*, when the insurance should begin, the insurer, by *accepting and retaining* the premium secured under such circumstances by the agent, ratified his act and waived the provision of the application that it should not be binding until accepted by the secretary of the insurer or an authorized agent,

and was estopped from denying the authority of such agent." (Emphasis ours).

Beswick vs. National Casualty Co. (Kas.) 226 S.W. 1031

The same rule was announced and applied in the case of *Fitzgerald vs. Colorado Life Ins. Co. (Kas.) 116 S W (2d) 242*

> "Applicant need not scrutinize blank submitted to him by soliciting agent as being proper blank for applicant to sign to make contract of insurance effective, but applicant may rely upon positive representations of agent."

Clark vs. National Aid Life Assn. (Okl.) 57 Pac. (2d) 832

Next we come to consider the effect of the unqualified acceptance of the application on December 1, 1949, about a week after the company had cashed the first "Premium Payment" check and converted the proceeds thereof to its own use.

A contract of insurance becomes effective upon the acceptance of the premium by the company and the acceptance of the application, notwithstanding the policy may, according to its terms, take effect at a later date.

Life and Casualty Ins. Co. of Tenn. vs. Palmer, 48 Ga. App. 380 (2)

In the instant case it was alleged that prior to the acceptance of the application by the company, and therefore at the time of the acceptance of the application by the company, there remained nothing for the applicant to do to effectuate the insurance.

> "A contract of life insurance is consummated upon the unconditional written acceptance of the application

for insurance by the company to which such application is made. . . . .

". . . . When the application is accepted and nothing remains for the applicant to do, the contract becomes complete.

"It (the insurance company) would have been guilty of no breach of trust in appropriating the fund to its own use. For this privilege, it thus acquired there must have been a corresponding benefit accruing to the original owner of the fund; and what he acquired in lieu of his money was an insurance upon his life, and a right to the policy which evidenced the consummation of the contract.

"This owner had a right to demand possession of it. Upon refusal, he could have recovered it by an action of trover. Conceding this right, we cannot see how death can rob the beneficiary of her rights under the contract."

New York Life Ins. Co. vs. Babcock, 104 Ga. 67, 73-74

It cannot possibly be denied, nor even questioned, that the petitioner and the deceased were entitled to the policy on December 1, 1949, and that it would have been delivered to them on that date had they gone to the company's home office in South Carolina and requested it.

This being true, petitioner is entitled to have the following equitable maxim enforced in her favor:

"Equity considers that done which ought to be done and directs its relief accordingly."

Sect. 106, Title 37 1933 Code of Georgia Annotated

It is true that a policy of insurance in Georgia is required to be in writing:

> "The contract of fire insurance is one whereby an individual or company, in consideration of a premium paid, shall agree to indemnify the assured against loss by fire to the property described in the policy, according to the terms and stipulations thereof. Such contract, to be binding, shall be in writing; but delivery shall not be necessary if, in other respects, the contract shall be consummated."

Sect. 801, Title 56, 1933 Code of Georgia Annotated

By another Code section this rule is made applicable to all types of insurance.

The requirement that the policy of insurance be in writing does not apply to any count of the petition except Count I.

Count II is an action for breach of promise or agreement to insure, and, therefore, it recognizes that no policy was issued and sets forth that there was an agreement to do so, and the failure to do so according to the agreement is grounds for recovery of damages.

Likewise, Count III recognizes that no policy was issued and is strictly an action for unreasonable delay in passing on the application.

In Count IV the requirement that the policy be in writing was met, in that the policy identically as agreed upon between the deceased and the company's general agent was actually issued in writing. The written policy was dated December 5, 1949, and this count prays for reformation of the contract so as to make it read as effective November 15, 1949, the date agreed upon by and between the general

agent and the deceased, or December 1, 1949, the date of the unqualified acceptance of the written application.

With respect to the requirement of the policy being in writing, as to Count I, the law appears to be that where the facts authorize it, the court can decree specific performance, compel the contract to be considered executed at the time justified by the facts, and grant a recovery on the policy in the same action.

> " 'The insured may bring an action at law upon the preliminary contract in the same manner as upon the policy. He may, however, treat the contract as an agreement to insure, and resort to a court of equity to compel the delivery of a policy either before or after the happening of the loss; and being properly in that court after the loss has happened, it is according to established course of procedure, in order to avoid delay and expense to the parties, for that court to proceed and give such final relief as the circumstances of the case demand. . . If the parties have entered into a preliminary agreement for insurance, the insurer is bound in good faith to furnish a policy in the usual form and with the usual clauses. If the policy does not conform to the previous agreement, the applicant may refuse to accept it, and recover back any money he may have paid in the premiums; or if he has accepted it, supposing it to conform to his contract with the insurer, a court of equity will reform it in a proper case.' 16 Am. & Eng. Enc. Law, 853."
>
> *Fort Valley Coca Cola Co. vs. Lumbermen's Co., 69 Ga. App. 120, 125.*

It was alleged that it would be a fraud upon petitioner to permit the company to accept her and her husband's funds on the representations of the company's agent and not be

responsible to her on the agreement for which the funds were given and accepted. Otherwise, as was held in *New York Life Insurance Co. vs. Babcock, supra.*, it would be guilty of a wrongful conversion of the funds. Pursuant to the agreement of the general agent, that the insurance would be in effect on November 15, 1949, if the company cashed the first premium check, the petitioner and her husband forewent obtaining other contemplated insurance when they ascertained that the check had been cashed. These facts warrant specific performance under the law of Georgia.

> "Where the law requires a contract to be in writing, equity will grant relief, if the party complaining has so acted on the parol contract as that it would be a fraud upon him to permit the other to deny the contract. But in such cases, the act must be in pursuance of the contract, on the faith of it, and induced by it."
>
> *Simonton, Jones & Hatcher vs. The Liverpool, London and Globe Insurance Co., 51 Ga. 77 (2)*

This rule is of universal application.

> "An insurance company is bound by the acts of its agent, whether general or special, which are within the scope of his real or apparent authority, notwithstanding that they are in violation of private limitations upon his authority of which the person dealing with him, acting in good faith, has no knowledge.'
>
> "Where insurer's soliciting agent had apparent authority to accept application, and applicant for accident policy, some eight days before her accidental death, had acted upon such apparent authority without notice to the contrary, to her detriment, beneficiary was entitled to specific performance of the alleged oral contract, notwithstanding that soliciting

agent was the general agent and did not have real authority to make oral contracts for insurance."

Hahn vs. National Casualty Co. (Idaho), 136 Pac. (2d) 739

"When a preliminary contract for insurance is valid it may be enforced in a court of equity against the company, and being enforced by the procurement of a policy, an action can be maintained upon the instrument; or the court in enforcing the execution of the contract may enter a decree for the amount of the insurance."

Insurance Company vs. Colt. 20 Wall. 560 (3), 22 L. Ed. 423

—". . . . Where the policy would have been binding if it had been issued, the agreement to insure will be held binding. Such an executory contract may be oral, although the statutes or the charter or by-laws of the insurance company provide that policies shall be in writing, or prescribe the mode of executing them."

32 C. J., Sect. 182, p. 1098

"It is well settled that a contract to insure or to deliver a policy of insurance may be specifically enforced even though a loss has already occurred, where there was a valid agreement before the loss; and in the latter case, the court having acquired jurisdiction of the cause, will retain it for the purpose of adjusting the loss and awarding damages. . . . ."

58 C.J. Sect. 297, p 1054

The right of reformation of an insurance policy which is

dated a different date from that agreed upon or implied by law is recognized and applied in Georgia.

> "Equity has jurisdiction to reform a written instrument, where there has been ignorance or mistake on the part of one of the parties accompanied by fraud, *or inequitable conduct on the part of the other party.* If the fraud or inequitable conduct complained of consists of an alleged misrepresentation of fact, it is immaterial whether the party making the misrepresentation of fact knows it to be false or not; it is nonetheless fraud in law, even though not fraud in fact."
>
> *Wellborn vs. Johnson, 204 Ga. 389*

This rule is likewise recognized as the authority by Williston in his work on contracts.

> "Some decisions hold that the parol evidence rule forbids enforcement of the parol waiver contemporaneous with the creation of a written contract. . . . .
>
> "Most decisions, however, support the right of the insured to recover, and to most minds these decisions will seem preferable if their result can be reached without wrenching legal principles. Most of the cases so deciding speak of estoppel, ... Two other principles have been invoked to explain, at least partially, the conclusion of the majority of the decisions: *fraud and reformation of contract.* The conduct of the insurer is not generally intentionally fraudulent, but to take money as a premium in return for a promise which the insurer must be held to know is invalid may fairly be regarded as a fraud in law by a court which does not require as an invariable requisite of fraud or deceit that an actual wrongful intent should exist, if the transaction is fraudulent the ques-

tion then arises as to the remedy of the defrauded party. . . .

"The other explanation suggested for allowing the plaintiff to recover is that the contract should be reformed in equity to express the real intention of the parties and that as a short cut an action at law on the policy is permitted on evidence being given that would warrant reformation."

Willison on Contracts, Revised Edition, Vol. 3, Sects 747, 748, 749, 750, pp 2120, 2123, 2124, 2125, 2126

It is also recognized that in such cases as the instant case an action may be brought for specific performance of the agreement to insure, as in Count I, or for breach of contract to insure.

"Where insurer received application for insurance, together with premium thereon, implied promise is thereby created on the part of the insurer to act on application within reasonable time, and insurer may be held liable for breach of implied promise, or applicant may waive contract and sue in tort for negligence on insurer's failure to act within reasonable time."

Travelers Ins. Co. vs. Taliferro (Okla), 54 Pac. (2d) 1069

"The failure on the part of the insurer to deliver the policy in accordance with the agreement at the time stipulated or within a reasonable time will render him liable in an action for breach of contract, or to a suit in equity for specific performance.

"Indeed, no citation of authorities is necessary to

support the proposition that damages may be based upon a broken promise to insure."

National Liberty Ins. Co. of America vs. Jones (Va.) 183 S. E. 443

Next we come to consider, with respect to Counts I and IV, whether the provisions in the application requiring issuance and delivery of the policy during the life and sound health of the deceased can be availing to the insurance company as a defense.

The company admits that if the policy had been issued prior to the death of the deceased the application would not have been attached, nor would any provision requiring issuance or delivery of the policy during the life and sound health of the deceased been in the policy itself.

This being true, and no delivery of the policy being required as a condition precedent to its binding effect under the law of Georgia, unless so stipulated in the policy itself or an attached application, the defendant company cannot insist upon issuance or delivery of the policy as a defense.

Delivery of the policy is not required by law:

". . . . Such contract, to be binding, shall be in writing; but delivery shall not be necessary if, in other respects, the contract shall be consummated."

Section 801, Title 56, 1933 Cole of Georgia Annotated

"Actual delivery of the policy to the insured is not essential to the validity of a contract of life insurance, unless expressly made so by the terms of the contract."

New York Life Ins. Co. vs. Babcock, 104 Ga. 67 (2)

The policy of insurance itself, which is sued on in Count IV, wherein reformation is prayed, and which is prayed to be decreed in effect by decree of specific performance in Count I, does not have any requirement of issuance or delivery in it.

The provision of issuance and delivery in the application is unenforceable and nugatory as a defense because the application is not attached to the policy dated December 5, 1949, and would not have been attached had the policy been issued and dated December 1, 1949, or previously.

> "All life insurance policies issued upon the lives of persons within this State, whether issued by companies organized under the laws of this State or by foreign companies doing business in this State, which contain any reference to the application for insurance, or the constitution, by-laws, or other rules of the company, either as forming part of the policy or contract between the parties thereto or having any bearing on said contract, shall contain, or have attached to said policy, a correct copy of said application signed by the applicant, and of the constitution, by-laws, and rules referred to and unless so attached and accompanying the policy, *no such application, constitution, by-laws or rules shall be received in evidence either as part of the policy or as an independent contract in any controversy* between the parties to or interested in the said policy, nor shall such application, constitution, by-laws, or rules be considered a part of the policy or contract between such parties."
>
> *Sect. 904, Title 56, 1933 Code of Georgia Annotated*

This statute has been repeatedly held as meaning exactly what it says:

"A stipulation in an application for insurance, whereby it is agreed between the insured and the insurance company that the agent of the company has no authority to waive or dispense with full, true and complete answers to the questions contained in the application, may not, when the application is not attached to the policy, serve as notice to the insured of the limitation of the agent's authority. To allow it to so serve would be in contravention of Code Sect. 56-904, requiring the application to be attached to the policy before it may be introduced as a part of the contract of insurance or as *an independent contract* in any litigation between the parties interested therein." (Emphasis ours.)

Gulf Life Ins. Co. vs. Bloodworth, 73 Ga. App. 102

The following cases apply the same rule:

Torbert vs. Cherokee Ins. Co., 141 Ga. 773 (1)
Mutual Benefit Health & Accident Assn. vs. Bell, 49 Ga. App. 640, 643, and cases cited.

On December 1 there was nothing left for the defendant to do except fill in the blanks in its policy form. Had this been accomplished, on December 1, 1949, but the policy dated December 5, 1949, it would still be binding as of December 1, 1949.

Life and Casualty Co. of Tenn. vs. Palmer, 48 Ga. App. 380 (2)

In the following Georgia case the facts were that the life policy application stated: "The insurance applied for shall not be binding on the company until the amount of the first premium shall be received in cash by said company or by some authorized agent thereof, during the lifetime of

the applicant. . . ." The applicant forwarded the premium to the soliciting agent at the time the application was made but the agent refused it; and the agent refused to deliver the policy later or accept the premium payment because the applicant was then sick.

> "Held, that on a bill filed for the recovery of the amount of the policy, equity will consider that done which ought to have been done. That under the circumstances it was the duty of the agent of the insurance company, who had received the policy from the company as the agent also of the applicant, and who had himself waived the payment of the premium when the application was made to him and had assured him that he would be insured any how, and had agreed to make the application for him, and had written to him that the policy was issued and ready for him, and he would deliver it the next week, to comply with his promise and to deliver it on payment of the premium by the applicant or his agent; and that it would be inequitable for the insurance company to refuse to pay the amount of the policy under these circumstances."
>
> *The Southern Life Ins. Co. vs. Edward T. Kempton, 56 Ga. 339*

Therefore, it appears that petitioner is entitled to both specific performance and reformation, and it necessarily follows that she is entitled to a recovery.

Count II presents a factual question, requiring a jury determination, of whether under the circumstances there was an implied acceptance of the applicant during his lifetime, due to the conduct of the company and its general agent.

> "It is the general rule that mere delay in passing upon an application for insurance is not sufficient in

and of itself to amount to acceptance even though the premium is retained. Misselhorn v. Mutual Reserve Fund Life Assn. C.C., 30 F. 545; 32 C. J. 1106. But an acceptance may be implied from retention of the premium and failure to reject within a reasonable time. 1 Joyce on Insurance, Sect. 57; Richmond v. Travelers' Ins. Co., 123 Tenn. 307, 130 S W. 790, 30 L.R.A., N. S. 954. . . . . .

"A strong decision in support of the present view is Douglass v. Mutual Benefit Health & Accident Assn., 42 N. M. 190, 76 P. 2d 453. This was an action on an accident and health policy involving facts very similar to those presented here. The soliciting agent there informed the applicant that the policy would be in effect as soon as the application and premium were received at the home office. The court held that the company was required to return the premium without unreasonable delay if the application was rejected, with notice of that fact, and sustained a recovery based upon an implied acceptance of the application. A similar holding was made in a life insurance case, Reck v. Prudential Ins. Co. 116 N.J.L. 444, 184, A. 777, cf. Peoples Life Ins. Co. vs. Whiteside, 5 Cir. 94 F. 2d 409; Williams vs. Home Ins. Co., 102 Kan. 74 169 P. 545; Phoenix Ins. Co. v. Hale, 67 Ark. 433, 55 S. W. 486."

American Life Ins. Co. of Ala. vs. Hutcheson, 109 F.(2d)424,427,428

There appears to be no direct authority in Georgia on this particular point, as is the case with respect to questions presented in Count III, although the following Georgia cases certainly indicate that the Georgia courts would uphold this contention of petitioner.

"Where a member of a mutual insurance company

fails to meet the assessments made upon him but subsequently transmits to the secretary thereof an amount of money in payment of all dues then demanded of him, which sum the company retains until after his death without notifying him whether it was satisfactory or not, such action was a waiver of the default and restored him to membership."

Georgia Masonic Mutual Ins. Co. vs. Gibson, 52 Ga. 640 (3)

"In our opinion the acceptance of the premiums and placing the money in the general funds of the defendant amounted to such an unconditional acceptance as to estop the defendant to contend that the policy was not in force at the date of the fire."

Progressive Fire Ins. Co. vs. Morrison, 72 Ga. App. 473, 482

The policy issued by the defendant, which was dated December 5, 1949, was identical with that which the deceased unconditionally agreed to accept on November 15, when he and petitioner paid their money for the policy. On page 1, this policy actually issued recited that it insures the defendant from December 5, 1949, for one month. On page 4, Section 3, under "General Provisions," it is stated: "This policy cannot be cancelled *for the term which the premium has been paid.*" (R., pp 49, 52.)

The check of the plaintiff and the deceased, which was dated November 15, 1949, and which the defendant cashed on November 25, 1949, is contended by the defendant as being payment of the premium for "the term" commencing December 5, 1949. The petitioner contends that the check was payment for "the term" commencing November

15, 1949, or at least not later than the term commencing November 25, 1949, the date the check was cashed. The check had printed on it: "Premium Payment. The Executive and Professional Accident Policy."

We submit that these two clauses, under the facts of the case, subject the policy to a construction with respect to what is meant by "the term." The policy nowhere, except in this Section 3 under General Provisions, on the last page, uses the words "the term."

In cases of possible construction the Georgia courts have consistently and repeatedly held that that construction will be taken which enures to the benefit of the insured, or beneficiary, and works to the detriment of the insurance company.

> "In determining whether under the terms of the contract of insurance the policy had lapsed at the time of the accident in question (or, in the instant case, had commenced at the time of the loss), there being a conflict in its provisions as to when the insurance became of force, the provision most favorable to the insured must control. . . ."
>
> *Parham vs. National Relief Assurance Co., 33 Ga. App. 59*

> "Insurance policies are prepared and proposed by the insurer; and where such a contract is capable of being construed in two ways, that interpretation *must be* placed upon it which is most favorable to the insured. . . . ." (Emphasis ours.)
>
> *State Mutual Life Ins. Co. vs. Forrest, Admrx., 19 Ga. App. 296 (1)*

Following this rule are the following cases:

United National Ins. Co. vs. Cody, 81 Ga. App. 527
Mass. Benefit Life Assn. vs. Robinson, 104 Ga. 256 (2)

Count III

There is no direct Georgia law for precedent in determining the questions in this count.

The Circuit Court of Appeals for the Fifth Circuit, citing no authority whatsoever, and making no attempt at all to ascertain how the Georgia courts would determine the questions if presented to the Georgia courts, held that, as a matter of law, this count was without merit.

This is clearly contrary to the decisions and previous mandates of this Court.

> "In view of the fact that the question in the case was regarded below, both by the courts and by counsel, as one of 'general' or 'Federal' law, the interest of justice requires that the judgment be vacated and the case remanded for the enforcement of the applicable principle of state law."
>
> *Ruhlin vs. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290.*

Though not applying the above rule of this Court, the Circuit Court of Appeals for the Fifth Circuit has recognized this rule in another case.

> "The command of Erie Railway Co. vs. Tompkins, 304 U. S. 64, is that the ultimate results reached in litigation in the Federal courts, predicated upon causes of action arising from the State law, must be the same as if the litigation had been conducted in the State courts. While the Federal court should properly em-

ploy its own rules of procedure to secure the just, efficient and prompt determination of all claims inherent in any litigation before it, nevertheless, the ultimate results reached must be such as accord with the substantive jurisprudence of the state of the forum. Thus, if there be no directly applicable state authority, the court must ascertain for itself what would be the declaration of the state law by the state courts in such a situation as confronts it."

Likenhoger vs. Owens, 181 F. (2d) 97, 99 (5th Cir.)

Two Circiut Courts of Appeals have held directly in conflict with the decision of the Circuit Court of Appeals in this case on the same subject matter.

"An insurer may be held liable in tort for damages to life policy applicant, where there has been unreasonable delay in acting on application, since business of life insurance is affected with public interest and insurer is bound to furnish indemnity State has authorized it to furnish or to decline to do so within such reasonable time as will enable applicant to act intelligently upon rejection.

"Generally mere delay in passing upon life insurance application is not sufficient to constitute acceptance of application, even though premium is retained, but acceptance may be implied from retention of premium and failure to reject within reasonable time.

"The case is governed by the law of Tennesseee. Erie Ry. Co. vs. Tompkins, 304 U. S. 64.

"No insurance decision in Tennessee is found precisely in point upon these facts.

"The judgment (in favor of the wife beneficiary of the husband insured) is affirmed."

American Life Ins. Co. of Ala. vs. Hutcheson, 109 F. (2d) 424 (6th Cir. Certiorari denied 310 U. S. 625, 84 L. Ed. 1397)

In that case the Sixth Circuit Court of Appeals could find no Tennessee decision to uphold the verdict and judgment and looked elsewhere and cited authority to support its decision from the courts of eleven states, Corpus Juris and several Federal court cases.

The Circuit Court of Appeals for the Seventh Circuit states the rule of law that an action lies for unreasonable delay in passing on an insurance application so emphatically as to leave no question.

> "It is equally well settled that an insurance company may be liable for its delay in passing upon an application for insurance." (Citing cases.)
>
> *Behnke vs. Standard Accident Insurance Co., 41 F. (2d) 696, 699 (7th Cir.)*

The Circuit Court of Appeals in its judgment in this case held that the provisions in the application requiring issuance and delivery were a bar to recovery on this count. This action is for tort and no provision in the application could possibly be a defense to this count. If anything, the provisions of the application concerning delivery placed a greater burden on the company to speedily pass on it, particularly when the applicant was contemplating obtaining other insurance in the event of a rejection of his application.

> "It is alleged further that under the policy the company was being paid for insurance from the time of the application though it did not become effective until the policy had been 'delivered to and received by the applicant during his lifetime and in good health,' be-

cause of these conditions the company owed a duty to the applicant to use reasonable care and diligence in passing upon the application and in the execution and delivery of the policy. . . .

> *"The cause of action being for damages resulting from the defendant's neglect to act promptly in considering the application, and in the issue and delivery of the policy there is no occasion for considering whether or not the policy was delivered as required by the contract,* of which question the briefs contain an extended discussion." (Emphasis ours.)

DeFord vs. New York Life Ins. Co., 224 Pac. 1049, 1050-51

All of the cases upholding an action for unreasonable delay hold that insurance is affected with the public interest and the company must use reasonable diligence in passing on the application for insurance.

It has been held by the courts of Georgia that insurance in Georgia is affected with the public interest.

> "The business of insurance is one so clothed with a public interest, affecting the community at large as to render it peculiarly subject to proper governmental regulation. German Alliance Ins. Co. vs. Lewis, 233 U. S. 389, 58 L. Ed. 1011."

Cooper Co. of Gainesville vs. The State, 187 Ga. 497, 500

"Of course, being affected with the public interest, its (insurance company's) business operations were subject to regulations prescribed by the laws of this State as a condition upon which the right to do business was granted."

Bankers Life & Casualty Co. vs. Cravey, Comptroller General, etc., Supreme Court of Georgia Decision No. 17687, decided January 29, 1952 (Not yet reported in official reports.)

In the case at bar *eighteen* days elapsed between the date of the application and the death of the applicant, and no direct notice or rejection or acceptance was given petitioner or her husband in the meantime.

In the following cases the question of delay in passing on the application was properly held a question of fact for the jury, and the verdicts for the plaintiff were upheld:

American Life Ins. Co. of Ala. vs. Hutchinson, 109 F. (2d) 424, 16 days involved.

DeFord vs. New York Life Ins. Co., 77 Colo. 146, 224 Pac. 1049, 1050-51 18 days involved.

Witten vs. Beacon Life Assn. (Kan.), 33 S.W. (2d) 989, 13 days involved.

Douglass vs. Mutual Benefit Health & Accident Assn. (N. Mex.) 76 Pac. (2d) 452, 2 days involved.

In the absence of applicable local laws, Federal courts are authorized and should look elsewhere for the rule to be applied in determining how the local State courts would decide the question.

"In the absence of local authority, Federal court may rely on general statement of the law."

Hornstein vs. Cramer Bros. Freight Lines, Inc., 133 F (2d) 143 (3rd Cir.)

"In the absence of any applicable local law, a Federal court is free to apply general law as most likely comporting with the local state's outlook."

Zephyr American Corp. vs. Bates Mfg. Co., 128 F. (2d) 380 (25) (3rd Cir.)

"Federal court, in absence of any applicable local law, is free to apply general law as most likely comporting with local state's outlook."

Chidester vs. City of Newark (Dist. Ct. of N. J.), 58 Fed. Supp. 787, following Zephyr American, supra.

"Where Illinois law had not been declared on state of facts alleged in complaint arising under Illinois contract, Circuit Court of Appeals was free to look elsewhere for rule of law that ought to be applied."

Fargo Glass & Paint Co. vs. Globe American Corp., 161 F. (2d) 811 (7th Cir.), citing:

Shell Oil Co. vs. Manley Oil Corp., 124 F. (2d) 714 (7th Cir.)

Following is additional authority that the questions presented in this count are jury questions:

"What is a reasonable period depends on the facts in each case.

"When the reasonable period expired and the insurer failed to communicate its rejection to applicant and also failed to return the amount paid with the application, applicant may assume, at least for a time, that the application has been accepted, and the insurer will be liable for the loss resulting from applicant's failure to attempt to place the insurance elsewhere, in reliance on his assumption of acceptance. . ."

44 C.J.S., Sect. 232, pp. 987.

"notice to the applicant of the rejection of the application is necessary where it is the understanding or agreement between him and the agent that insurance is effective unless disapproved or rejected by the company."

32 C.J., Sect. 196, p. 1107

"An insurer has the duty to act upon an application for life insurance with reasonable promptness and to refrain from doing anything reasonably calculated to mislead the applicant."

Keller vs. Provident Life & Accident Ins. Co., (S.C.) 49 S.E. (2d) 577

"What was the reasonable time within which the premium could be returned and the applicant thus apprized that the insurance had been declined would be a question of fact to be determined in the particular case . . . Nor could the death of the insured within two days of the application and delivery of the receipt, as contended for by the appellant, affect the result."

Douglas vs. Mutual Benefit Health & Accident Assn. (N. Mex.), 76 Pac. (2d) 453, 460

"Where insurer accepted and retained life policy premium, received medical examination report on applicant on October 12, and on October 14 requested another blood pressure test to be taken, whether insurer unreasonably delayed its action on application so that acceptance was implied, and policy was in force on date of insured's death, which occurred on October 26, was for jury."

American Life Ins. Co. of Ala. vs. Hutcheson (6th Cir.) 109 F. (2d) 424

It is contended once this Court takes jurisdiction of this case all questions propounded should be determined by this Court. Consequently, we shall point out the right of the petitioner to maintain this count in her own individual name. The District Court, though as obiter dictum and not considered by the Circuit Court of Appeals, held that the petitioner could not maintain this count in her individual name.

It must be borne in mind that it was the *joint funds* of petitioner and her husband that the defendant appropriated to its own use when it cashed the check for the first premium; that petitioner was named as the sole beneficiary in the application and that petitioner was the only person who could suffer if her husband met accidental death with no insurance protection in force. Petitioner had a property right in the application and in the funds that the defendant appropriated to its use.

> "As a general rule, the action on a contract, whether express or implied or whether by parol or under seal, or of record, shall be brought in the name of the party in whom the legal interest in such contract is vested, and against the party who made it in person or by agent. The beneficiary of a contract made between other parties for his benefit may maintain an action against the promisor on said contract."
>
> *Sect. 108, Title 3, 1933 Code of Georgia Annotated*
>
> "An action for a tort shall, in general, be brought in the name of the person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed, and against the party committing the injury, either by himself, his servant, or agent in his employment."
>
> *Sect. 109, Title 3, 1933 Code of Georgia Annotated*

Certainly petitioner had a legal right that was affected. In the absence of unreasonable delay the policy would have been in her hands at the time of her husband's death, and there would have been no question of liability.

Moreover, there can be no doubt that petitioner has a legal right to maintain an action in her own name for breach of the promise to insure, as set out in Count II. Under the law of Georgia, she has a right to bring an action *in tort* for this breach of a duty created by contract, express or implied.

> "If a contract imposes a legal duty upon a person, the neglect of that duty is a tort founded upon a contract. In such a case, the liability arises out of the breach of duty incident to and created by the contract, but is only dependent upon the contract to the extent necessary to raise the duty. The tort consists in the breach of the duty."
>
> *The City & Suburban Ry. of Savannah vs. Brauss, 70 Ga. 368 (1)*

This rule of law is also set forth in the following cases:

Payne vs. Watters et al., 9 Ga. App. 265 (2nd case)

Lea vs. Harris, 88 Ga. 236

L. & N. Ry. Co. vs. Spinks, 104 Ga. 692

State Mutual Life Assn. vs. Baldwin, 116 Ga. 855, 860

Postal Telegraph & Cable Co. vs. Kaler et al. 65 Ga. App. 641

Therefore, petitioner has the right to prosecute this count on the ground that she has a property right in the

subject matter and the funds that were accepted by the defendant company, and because insurance in Georgia is affected with a public interest, and insurance companies must use diligence in passing on an application for insurance; also, because of the breach of the agreement to insure. Petitioner can maintain this tort count in her own name on the grounds that the tort grew out of the breach of the duty created by the agreement.

CONCLUSION

It is respectfully submitted that this Court should grant the writ of certiorari in this case and review all of the questions presented.

Although the Circuit Court of Appeals for the Fifth Circuit failed to attempt to ascertain what the courts of Georgia might do with the question presented in Count III, and this alone would require a reversal and the remanding of the case to that court for a determination of what the Georgia courts would decide, we respectfully urge this Court to review the entire record and adjudicate the correctness of petitioner's contentions that the Circuit Court of Appeals erred with respect to Counts I, II and IV, and also determine the applicable law of this case with respect to Count III.

Respectfully submitted,

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Reserve Loan Life Ins. Co. vs. Phillips, 156 Ga. 372, 376; 119 S. E. 315 . . . . . 13, 19

Ruhlin vs. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290 . . . . . 7, 8

Savage vs. Prudential Life Ins. Co. of Amer. (Miss), 121 Southern Reporter 487 (2 and 3) 488-489 20

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IN THE SUPREME COURT OF

THE UNITED STATES

.....TERM, 1952

MRS. PAULINE R. BURKS

Petitioner

vs.

COLONIAL LIFE & ACCIDENT INSURANCE COMPANY OF COLUMBIA, SOUTH CAROLINA

Respondent

BRIEF OF RESPONDENT OPPOSING GRANT OF WRIT OF CERTIORARI

STATEMENT OF THE CASE

In the statement of the case contained in the petition for writ of certiorari, petitioner, the plaintiff in the court below, undertakes to give in narrative form the allegations of the four counts of her complaint and in the main it does correctly set out substantially the allegations of these four counts of her complaint. She does not undertake to give any other summary of the evidence which was submitted to the court by the various affidavits of defendant's officers and employees, though she does include, as if it were some of the allegations of the complaint, some of this evidence and also some argumentative matter. We respectfully refer the court to the complaint itself for its exact allega-

tions and in addition we set forth briefly the undisputed facts given in evidence by the affidavit of defendant's officers and employees as follows:

David Halsey Burks, on November 15, 1949, signed an application for accident insurance in the defendant company, copy of which application is attached to the complaint as Exhibit C. Said application contained the following provisions:

> "I further agree that this insurance shall not be in force until the application is accepted and the Policy issued by the Company nor until the Policy is delivered to and accepted by the applicant while in sound health and free from injury."

Said application was mailed by the agent on November 19 and received by the defendant at its home office on November 21, 1949. In due course it was considered and was on November 29 marked rejected, but was reconsidered on November 30 or December 1 and marked "O.K., J.C.J.". It was sent to the Policy Issuing Department of defendant company either late Friday afternoon, December 2 or Monday morning, December 5, defendant's office having been closed on Saturday and Sunday, December 3 and 4. A policy was prepared, dated and countersigned on the morning of December 5, 1949, but before the usual letter of transmittal of said policy had been written, and on the same morning defendant was informed of the death of the said David Halsey Burks on December 3, 1949. Said policy was not mailed or delivered and remained in the possession of defendant. On the same day December 5, 1949, defendant wrote a letter to the estate of David Halsey Burks enclosing defendant's checks for $10.00 as a refund

of the deposit delivered to it to cover first premium, and also enclosing eleven unused monthly checks which had been delivered to it. The Company's check for $10.00 was subsequently returned to it by plaintiff's attorney and was thereafter continuously tendered to the plaintiff. (R.83-87)

The foregoing facts were set out in substance as statement of facts by the District Court in its opinion in this case (R.116-117) and were admitted and practically adopted as allegations of the plaintiff in Count Four of her complaint which was added by way of amendment at a later date. In addition to these undisputed facts, plaintiff alleges in her complaint, and the defendant denies in its answer, that G. C. Poole, agent of the defendant company, advised the applicant at the time of his application "that if the Home Office cashed the check dated November 15, 1949, it would mean the company had accepted him and his policy would be forthcoming and would be dated November 15, 1949." It is further alleged by the plaintiff, and denied by the defendant, that it was agreed between this agent and the applicant that the check which was later deposited was payment of a policy premium for the period beginning November 15, 1949, for one month and that if accepted he would be covered by insurance during that period.

OPINIONS OF DISTRICT AND CIRCUIT COURTS

The District Court in this case dismissed the complaint on motion for summary judgment. It treated together Count I (for specific performance), Count II (for breach), and Count IV (for reformation), of the complaint, as being dependent upon a valid, completed contract of insurance.

The opinion of the District Court is set out at pages 115-126 of the record and was incorporated in full in the opinion of the Circuit Court of Appeals (R. p. 138-145). The opinion of both of these courts as to Counts I, II and IV of the complaint was squarely based on controlling decisions of the courts of the State of Georgia and the statutes of that state Count III of the complaint sought damages for the alleged negligence of defendant in delaying in the issuance of the policy. In dealing with Count III the District Court recognized that there was no Georgia statute or case immediately controlling on the right to sue an insurance comapny in tort because of such alleged delay. It recognized the rule of Georgia courts as being the elemental rule that there can be no tort without a breach of duty and that the mere filing of an application for insurance did not impose upon defendant any duty to act at all, much less promptly. This amounted only to an offer which defendant might accept, reject or leave unanswered. The District Court therefore chose to follow what it considered the better rule as laid down by cases from other jurisdictions and held that there could be no tort, because no breach of duty, in such circumstances. The District Court further held that it was immediately controlled, as to Count III by the Georgia statutes and decisions that lay down the rule that a right of action in tort does not survive the death of the person injured or damaged and that only he, in his life-time, can commence on action for such a tort.

The Circuit Court of Appeals dealt with Counts I, II and IV by affirming that they were controlled in point and principle by the Courts of Georgia and adopted the opinion of the District Court as to those counts. It expressly refrained from approving or disapproving the opinion of the District Court as to Count III alleging a right of action in

tort for the alleged delay in accepting the application or the issuance of a policy. As to Count III (R. p. 142-5) Judge Russell, speaking for the Circuit Court, said:

> "While we fully recognize and give obedience to the fundamental principle that the existence of negligence and the determination of what constitutes a 'reasonable time' are generally for determination as questions of fact upon consideration of pertinent circumstances, we are nevertheless of the firm opinion that under the precise facts and circumstances of this case *a finding of negligence based upon reasonable delay would not be legally supportable. The minds of reasonable men could not differ on these facts. We are therefore not required to determine, or to express it more accurately, declare, the law of Georgia which would be applicable if a factual basis for such finding existed. The Georgia Courts do not appear to have passed upon the question and, since we find at the beginning of our consideration of it the existence of an insurmountable bar to any recovery by the complainant a discussion of the legal merits, otherwise, of this claim could be only academic.* We therefore refrain and, setting forth the trial Court's opinion upon this feature of the case only for the purpose of completeness of quotation, place our decision of affirmance of the ruling of the trial Court upon the third count of the complaint upon the grounds which we have stated."

Through her petition for writ of certiorari and supporting brief, we think that petitioner indicates a misconception of what the Circuit Court referred to as constituting "*an unsurmountable bar to any recovery by the complain-*

ant". Petitioner says the Court could only have been referring to the requirement in the application that the insurance shall not be in force until the policy is delivered to and accepted by applicant while in sound health. We submit that the Circuit Court referred to its decision on the facts that "under the precise facts and circumstances of this case a finding of negligence based upon reasonable delay would not be legally supportable". This is the only point decided by the Circuit Court as to Count III.

BRIEF AND ARGUMENT

Importance of Questions and Reasons Relied on for Allowance of Writ

Petitioner seeks to bring the questions involved within the suggestions of Supreme Court Rule 38; paragraph 5 (b), contending that the decision of the Circuit Court was: (1) in conflict with decisions of two other circuits as it concerned Count III and, (2) in conflict with decisions of the courts of Georgia as to Counts I, II and IV.

(1)

The Decision of the Circuit Court does not conflict with Decisions of other Circuits

Petitioner contends the decision as respects Count III is in conflict with these two decisions of other circuits, towit:

> American Life Ins. Co. of Alabama vs. Hutcheson, 109 F. (2d) 424 (6th Cir.) (Certiorari denied 310 U. S. 625; 84 L. Ed. 1397)
>
> Behnke et al. vs. Standard Accident Ins. Co. of Detroit, Michigan, 41 F. (2d) 696 (7th Circuit)

In the Hutcheson case any decision on the tort theory was obiter for the recovery allowed was on an implied contract and was squarely based on decisions for the Courts of Tennessee, where the Federal Court was sitting.

In the Behnke case the 7th Circuit followed the law of Wisconsin which holds that an oral contract of insurance is valid (in Georgia such a contract must be wholly in writing). The Court went on to hold, in headnote 7, that in that case as a matter of law, the insurance company was not negligent under the facts alleged and proved.

In the Behnke case the decision was exactly to the same effect as in the instant case and obviously could not be in conflict with it. In the instant case the Circuit Court refused to rule on whether such a tort action would lie but held that even if it would lie no jury question was presented by the facts alleged and proved as to the supposed delay. This could not be in conflict with the Hutcheson case or any other case which had ruled on the question of whether there could be a right of action asserted in tort in such circumstances. Whether in a given case the pleadings and evidence are sufficient to carry a case to a jury is an every day question common to every type of case. Such a decision sets no precedent and can never conflict with other decisions on principle for it depends purely on a question of fact—the sufficiency of the evidence. It could not constitute such "special and important reasons" for granting a writ of certiorari as is contemplated by Supreme Court Rule 38 par. 5.

Petitioner cites on page 3 of her petition the case of Ruhlin vs. New York Life Ins. Co., 304 U. S. 202, 82 L. Ed. 1290 to support her contention that uniformity between

the circuits will be enforced by grant of certiorari where conflict appears. After certiorari had been granted in that case and oral argument had been heard on March 10, 1938, but before the decision had been rendered on May 2, 1938, the case of Erie R. R. vs. Thompkins, 304 U. S. 64 was decided by the Court on April 25, 1938. In the Ruhlin case this Court commented, "Had Erie R. Co. vs. Thompkins been announced at some prior date the course of this case might have been different. This Court might not have issued a writ of certiorari". This Court went on to say (headnote 2):

> "As to questions controlled by state law, conflict among Federal Circuit Courts of Appeals is not of itself a reason for granting a writ of certiorari by the Supreme Court of the United States, as the conflict may be merely corollary to a permissible difference of opinion in the state courts."

This court in the Ruhlin case further held "we decline to decide the issue of state law". This Court then remanded the case because the circuit court (having decided the case before Erie R. Co. vs. Thompkins) had refused to consider the state court decisions and had decided the case independently under general principles of law.

As both the Hutcheson case and the Behnke case followed the decisions of their respective state courts, they could not, under the ruling of this Court in the Ruhlin case, constitute such conflict as would be a reason for granting the writ of certiorari.

(2.)

No Conflict With Georgia Decisions

Petitioner contends that the decisions of the District Court and the Circuit Court are in conflict with Georgia

decisions as to Counts I, II and IV. But petitioner cites no immediately controlling Georgia decision to the contrary though numerous Georgia decisions, almost identical on their facts, were cited to the District and Circuit Courts, which held that in such circumstances there is no valid, written contract of insurance on which there can be a recovery. Some of these controlling Georgia decisions are cited in the opinion of the District Court (R.P.118-123) which was adopted by the Circuit Court. Others will be cited by us later in this brief. No reason is shown on this point for granting a writ of certiorari.

Petitioner's Real Reasons for Asking Issuance of Writ

Before discussing the Georgia decisions and statutes we suggest that it is manifest from the brief filed by petitioner in support of her application for certiorari that she is invoking issuance of the writ merely to obtain another hearing on points twice decided adversely to her contentions; that she is seeking a review of a judgment based solely on a question of fact, towit: the ruling of the trial court, upheld in result by the Court of Appeals, refusing to submit certain questions to the jury. If this Honorable Court took jurisdiction, all that it could possibly decide would be the law of the State of Georgia applicable to the facts of this particular case; and as the Georgia state courts, as well as those of other jurisdictions, would be free to decide differently in cases yet to arise, and might well do so, the decision of the U. S. Supreme Court would not serve to settle, with any finality, any question of law which any state court, or any federal court bound to apply state law, would be compelled to follow.

COUNTS I, II AND IV

The decisions of the District and Circuit Courts are controlled by Georgia statutes and decisions on these counts. Believing it unnecessary to quote the language of the Georgia Courts we will state the principle announced and cite the cases so ruling, inviting this Court to check our accuracy in so doing by an inspection of the decisions and statutes cited.

The application for the policy provided:

> "I further agree that this insurance shall not be in force until the application is accepted and the policy issued by the Company; nor until the policy is delivered to and accepted by the applicant in sound health and free from injury."

No policy was ever delivered to or accepted by Burks. He died December 3 and the policy was not written up until December 5. Before the transmittal letter was written defendant had been notified of his death.

(a) Contracts of insurance in Georgia must be wholly in writing and may not be partly in parol.

See: Code of Georgia, Section 58-213
Code of Georgia, Section 56-801
Code of Georgia, Section 56-911
Newark Fire Ins. Co. vs. Smith—176 Ga. Rep. 91, 94-6 167 S. E. 79
Knight vs. Superior Fire Ins. Co.
80 Fed. 2d 311 (5 C.C.A.)

The following cases expressly held that alleged oral agreements of the agent at the time of taking the application could not create a contract of insurance or modify or change the terms of the writing.

See: Fowler vs. Liberty National Ins. Co.
73 Ga. App. 765, 770 (4)
38 S. E. 2d 60
Maddox vs. Life & Cas. Co.
79 Ga. App. 164, 176 (5)
53 S. E. 2d 235

Petitioner devotes a considerable proportion of her brief to her contention that the authority of defendant's agent was not limited and that the alleged oral agreements or representations would constitute a waiver or estoppel which would prevent defendant from denying a recovery to plaintiff. The cases cited invoke such doctrine to deny to an insurance company the right to defeat recovery on a policy already issued and delivered on the ground of breach of warranty or of representation by the insured, when such a breach has been waived, or the company estopped to assert it, by the knowledge or acts of the agent. There is no such question in this case. It would be necessary, if plaintiff's contention is to avail anything, that a contract be created by waiver or estoppel. The courts frequently hold a company estopped to assert a breach of contract but we have found no cases wherein the courts hold a contract to be created by waiver or estoppel. In the opinion of the lower court in the instant case (R. 120-121) this difference was well expressed as follows:

"There is no question of waiver of terms agreed upon by the parties. The question is rather what was the

agreement between the parties, if any. The terms of Burks' offer cannot be altered by oral representations. Maddox v. Life and Casualty Ins. Co. of Tenn., supra. Furthermore, the condition contained in the application not only gave certain rights to the Company but it reserved certain definite rights to the applicant, namely the right to accept or refuse any policy issued by the Company. Since it was a right belonging to both parties, it was not something which one party could waive and thus create an unconditional obligation out of a conditional one."

The Court of Appeals of Georgia, in the case of Life & Casualty Co. of Tenn. vs. Carter, 55 App. 622, 626, 191 S. E. 15, said:

"Estoppel is negative (thou shalt not); it is not creative (thou shalt). In the Hale case the insured, it seems, was asserting the negative, thou shalt not destroy my policy; and this contention was upheld. In the instant case the insured is in effect asserting thou shalt create a different kind of policy by changing one of the conditions in the policy as written. The policy as written can not be affirmatively transformed by estoppel."

(b) Delivery, while not essential as a matter of law under Georgia Code Sec. 56-801, is essential if required by contract, contained either in the application or the policy. In cases whose facts parallel those of the instant case the Georgia Courts have upheld the requirement of delivery.

See: Mitchiner vs. Union Central Life Ins. Co.
185 Ga. Rep. 194, 196
194 S. E. 530

Newton vs. Gulf Life Ins. Co.
55 Ga. App. 330, 332
190 S. E. 69

Reserve Loan Life Ins. Co. vs. Phillips
156 Ga. 372, 376
119 S. E. 315

Metropolitan Life Ins. Co. vs. Tharpe
20 Ga. App. 706
93 S.E. 299

Delivery, where required by the contract, is held to be a condition precedent.

See: Volunteer State Life Ins. Co. vs. McGinnis
29 Ga. App. 370, 371
115 S. E. 287

In the lower court plaintiff relied strongly on the case of New York Life Ins. Co. vs. Babcock, 104 Ga. 67 to support her contention that delivery was not essential and this case is cited to this court on pages 18 and 25 of plaintiff's brief. As will be seen by an examination of that case, at page 68 and the top of page 69, the application for the policy therein did not require delivery but simply required approval of the application. Code Section 56-801 was cited to the effect that delivery is not required by statute and therefore it was held that in that case delivery was not required. However, on page 71 the court even in that case clearly recognized that delivery is essential where made essential by the contract saying "we do not mean to say, however, that the insurer and the insured cannot by their contract make an actual delivery of the policy essential to its validity".

It must be kept in mind that the suit in the instant case deals with an application which does require delivery and not with an application which is satisfied merely by acceptance of the application at the home office as is true of almost all of the cases cited by the plaintiff. Neither does the instant suit involve a type of policy which provides for a preliminary or temporary insurance which shall date as of the date of the application under certain circumstances, as do many of the cases. None of the cases in those categories could have any application whatever to the decision in the instant case, but only such cases as deal with an application for insurance which in terms required delivery to the applicant before there could be an insurance contract. In fact we have not found any contrary Georgia decision to the ones which we have cited where the facts show that the application did contain a requirement of delivery in order to make an effective contract. This question of delivery is paramount in this case and we believe will decide practically all, if not all, of the collateral issues which have been raised; and as we see it, it is well settled and undisputed under the Georgia law. There is no pretense in the pleadings or the facts put in evidence that there was any delivery of the policy in the instant case, it being uncontradicted that Mr. Burks died on December 3 and the policy was not even written up until December 5 and dated that day before it was even transmitted the defendant was notified of the death of Mr. Burks and did not even write the transmittal letter.

(c) Reformation

Plaintiff amended her petition by adding a fourth count seeking reformation so as to reform and change the date of the policy which was issued after the applicant's death,

on December 5, and have it dated prior to his death, either November 25, the date when the check was deposited, or December 1 or December 2, the date when the application is supposed to have been marked "O.K.". The case of Reese vs. Fidelity Mutual Life Insurance Company, 111 Ga. 482; 36 S. E. 637, was a case seeking reformation and the court refused to allow the prayers of the petition but upheld a finding on the law for the defendant. The case of Boswell vs. Gulf Life Ins. Co., 197 Ga. 269; 29 S. E. 2nd 71, also was a case in which the plaintiff prayed for reformation so as to change the date of the policy. In the Boswell case the application, as in the instant case, provided that there should be no insurance contract until a policy should be issued and delivered, but the policy was dated at a date subsequent to the death of the applicant. In that case Judge Bell, the other Judges concurring, said:

> "The time when an insurance policy shall become effective is an essential element of the contract, and the parties may fix a future date upon which it shall become effective" * * * "A policy bearing a given date and purporting to insure for the future only, cannot be made the basis of an action to recover for a loss occurring on a prior date." * * *
>
> "In this case the application amounted only to an offer, and the company was free either to accept or to reject it entirely. Accordingly in acting upon the application it could fix a future date on which the policy would become effective. If the policy as thus issued, either because of its date or other reason, did not conform to the application, it would constitute only a counter offer and could not be reformed merely because of such variation."

The court further went on to state that it was unnecessary to determine whether there had been an actual or constructive delivery in that case for the policy being dated after the date of the applicant's death, as the company had a right to do, could not be reformed so as to have it dated before his death, and therefore there was no insurance contract, the application having required delivery.

(d) Application not Attached to Policy.

Petitioner has argued at length in her brief that the evidence shows that the application in this case was not attached to the policy which was issued on December 5 and that under the Georgia Code Section and other cases it is clearly held that when an application is not attached to the policy then it cannot be a part of the insurance contract. Obviously this is good law, but it pre-supposes that a policy is not only issued, but if required is delivered, so as to become itself a binding contract of insurance, before this law can have any application to the case. We have already shown that because the requirement of delivery was not met there was never any policy of insurance which became a binding contract of insurance, it not having been issued until two days after the applicant's death, and never having been delivered. Therefore the law which requires an application to be attached to a policy before it can be considered a part of the policy itself and therefore a part of the contract, can have no application whatever to the present case.

The case of Maddox vs. Life & Casualty Ins. Co. of Tenn., 79 Ga. App. 164 supra was a suit on one of the type of policies which did not require delivery but which provided for preliminary insurance from the date of the application under certain circumstances, provided only the appli-

cation had been accepted. Such acceptance not being shown in that case, the court expressly stated that the plaintiff's rights depended upon the terms of the application, as shown by the decision on page 169 in that case. The same thing is true in practically each of the cases which we cited dealing with the question of delivery, for when there has been no delivery and therefore no policy of insurance which is a valid and binding contract, the only rights which the plaintiff has and can assert are such rights as the application would give him. So in the instant case the plaintiff is dependent upon asserting rights under the application as an offer to contract or else she is out of court, unless the court should decide that the requirement of delivery was complied with and there was a binding policy of insurance which became effective because of delivery. If the plaintiff would abandon the terms and provisions of the application, then she has abandoned everything she has in the case. Where there has been no delivery and therefore no binding policy of insurance, the suit must be on the application or there is no standing whatever in court. The rulings in the following cases, in addition to the Maddox case are to this effect:

Fowler vs. Preferred Accident Ins. Co., 100 Ga. 330 (1-3), 331-334; 28 S. E. 398

Johnson vs. American Nat. Ins. Co., 134 Ga. 801, 802-3; 68 S. E. 731

Boswell vs. Gulf Life Ins. Co., 197 Ga. 269 (1), 272; 29 S. E. and 2nd 71.

We believe that the foregoing authorities and comments we have made will dispose of the contentions and argument of plaintiff's attorney which are rather intriguing, but it seems to us are not sound. He contends first that the policy

should be dated back to a date before the death of the applicant. Then he would build on this hypothesis and say that having dated the policy back to a date that would make it an effective contract, then the application not being attached, the provisions in the application requiring delivery would have no effect. But in seeking to establish his first hypothesis, that the policies should be in equity considered to be dated back, he ignores the requirements of the application which required delivery before there could be a binding policy of insurance. He seeks to ignore these and then, having established a policy, to wipe out the requirements of delivery as contained in the application. Obviously they cannot be ignored in order to have the policy dated back, and there is the fallacy of his argument because the contract cannot be dated back because of these very requirements in the application. Not being dated back then the effect of the terms of the application cannot be destroyed because it was not attached to the policy itself.

(e) Prepayment of First Premium

In plaintiff's brief page 30, a similar contention is raised with reference to Paragraph 3 on the back of the policy which provides that the policy cannot be cancelled for the term for which the premium has been paid. What is this term for which the premium has been paid is clearly set forth on the front page or face of the policy itself which provides "this policy is issued in consideration of the application and the payment in advance of the monthly premium of $10.00 to commence on the 5th day of December, 1949".

But for the reasons stated in subdivision (d) above, this argument is also fallacious because the provisions of the policy which was issued two days after applicant's death

and which was never delivered, cannot be invoked by either party to this case because the policy never became a binding contract of insurance or any part of such a contract. The fact that an advance payment was made and was deposited or cashed by the defendant would in no way affect the rights of the parties under the decisions we have cited, all dealing with the identical question involved in the instant case, towit: a provision in an application which required delivery before there should be effective insurance. The fact that the first premium was prepaid in those cases was held not to affect the rights of the parties nor to make a contract where there otherwise was none because of failure to deliver the policy. See:

Maddox vs. Life & Casualty Ins. Co.,
79 App. 164, 175 (4).

Boswell vs. Gulf Life Ins. Co.,
197 Ga. 269
29 S. E. 2nd 71

Reserve Loan Life Ins. Co., vs. Phillips,
156 Ga. 372
119 S. E. 315.

COUNT III

As to this Count the Circuit Court decided that there was not sufficient evidence to carry the case to a jury. It refused to decide, as between the two conflicting lines of the authorities in jurisdictions outside of Georgia, whether any legal right existed to sue in tort *if there had been sufficient evidence to go to a jury* on the theory of negligence because of delay by defendant. As pointed out by this Court in the Ruhlin case, supra, this Court will not

undertake to decide what the law of Georgia might be when called upon to decide this question.

The District Court did decide the question, choosing to follow the line of cases it thought, and we submit, are better reasoned. The contrary line of cases seems to be in the minority. These cases generally were written with "scissors and paste" and refer to some other case as a precedent and give no reasons of their own for the conclusions reached. Where they do give reasons these are typical: (1) lightning or storm insurance on crops in its nature demands haste and in many states (but not in Georgia) may be contracted by oral binder, (2) the business of insurance is affected with a public interest and public policy requires a prompt answer, (3) often the decision is really placed on implied contract in jurisdiction where oral contracts of insurance are recognized.

On the contrary the line of cases followed by the District Court gives full and logical reasons for the conclusions that no suit in tort will lie. These reasons are that an application for insurance is a mere offer to contract which may be accepted, rejected or unanswered, and in the manner prescribed in the offer (the application). Until and unless accepted no duty devolves upon the other party and there can be no tort without a legal duty and a breach thereof.

See: Savage vs. Prudential Life Ins. Co. of Amer. (Miss.)
121 Southern Reporter 487 (2 and 3) 488-489
Metropolitan Life Ins. Co. vs. Brady (Ind.)
174 N. E. 99, 100, 102-3
National Union Fire Ins. Co. vs. School Dist. (Ark.)
182 S. W. 547 (1, 3, 4) 458

In a thorough and well reasoned decision the District Court of Missouri listed and discussed the leading cases in the two contrary lines, exposed the spuriousness of the reasoning of the contrary line and the soundness of the supporting line of cases.

See: Munger vs. Equitable Life Assur. Soc. of the U.S.
2 Fed. Supp. 914 (1-2), 915-921 (Dist. Ct. W. Dist. Mo.)

The underlying principles of the supporting line of cases are fully recognized in decisions of this Court and the Courts of Georgia. In Giddings vs. Insurance Company, 102 U. S. 108, 111, 26 L. Ed. 92, this court said (it was not a tort case and therefore it was dictum so far as the tort theory is concerned): "The presentment of the application to the agents * * * and its receipt by the (Insurance) company, in no wise committed or bound the latter to anything. It was competent for the company to pause as long as they might deem proper, and finally to accept or reject the application as they might choose to do. If they elected to contract, they had the right to prescribe the terms, and it was for the other party to assent to or reject them. His unbroken silence, as would have been such silence by the company after receiving the application, was necessarily negation. Neither party in such case would have been bound in any wise to the other, because there would have been wanting the mutual assent of the minds of the parties, which is vital in all cases to the creation of a contract obligation".

Holding to the same effect see:

Home Ins. Co. vs. Swann
34 Ga. App. 19 (2), 24, 25

There is no pretense that defendant killed the applicant or otherwise committed any affirmative tort. If defendant had no duty or obligation under a contract it was under no duty at all; and hence there was no tort.

See: Code of Georgia, Section 105-101
Code of Georgia, Section 105-103
Code of Georgia, Section 105-104
Georgia Kaolin Co. vs. Walker
54 Ga. App. 742, 746-47

Beneficiary cannot sue in Georgia

In each of the cases in the contrary line of decisions the suit was brought in tort by the administrator of deceased applicant except a few where the courts denied recovery and held that the tort was to deceased and the beneficiary could not sue but suit could only be maintained by an administrator of deceased.

See: Vuke Stray vs. Western Life Ins. Co.
300 Pacific 1046; 75 A.L.R. 950-952
Deford vs. New York Life Ins. Co.
75 Colo. 146
224 P. 1049, 1050
Duffie vs. Bankers Life Asso.
160 Iowa 19
139 N. W. 1087
46 L. R. A. (N. S.) 25
Bradley vs. Federal Life Ins. Co.
129 N. E. 171
15 A. L. R. 1021, 1024

We believe it will be perfectly clear to the court that if any right of action had survived, it would survive to an administrator and not to an heir at law. But under Code Section 3-505, and the construction of that statute by the Supreme Court of Georgia, it is held that the survival mentioned in that Code Section deals only with the survival of a right of action held by an individual before suit is filed. It is true that in 1935 this Section was amended so that a right of action against a wrong-doer shall survive against the administrator of the wrong-doer, but it did not change the Section as to the person who was himself injured. As to him, his claim for tort dies with him and there has never been any amendment to change the law as set forth by our Supreme Court that his cause of action ceases with his death. This is precisely held in the case of Frazier vs. Georgia Railroad Company, 101 Ga. 77 (1). Plaintiff's brief has cited no authorities to the contrary and we are satisfied there are none.

CONCLUSION

The application amounted only to an offer to contract under the terms and conditions it prescribed. This offer could not be varied or enlarged by any alleged parol agreement with the agent. Under the rulings of the Georgia courts, this offer cast no duty whatsoever upon the defendant, which might accept or reject it at its pleasure, without any time limit. A failure to accept it would amount to a rejection in law. It could not be accepted simply by putting the letter "O.K." on the application for the offer itself prescribed what would be acceptance and make a binding contract and that is that a policy should be issued (before his death necessarily) and further that such policy should be delivered to the applicant who must accept it while he

is still in good health. Obviously no contract was ever completed in the instant case. There being no such completed contract plaintiff's case must fail as to Counts I, II and IV. It must also fail as to Count III because the defendant being under no duty or obligation to accept the offer of the deceased, could not be guilty of negligence because it had not accepted such offer before his death.

The decision of the Circuit Court was not in conflict with decisions of the Georgia courts, and as pointed out at the beginning of this brief it is not in conflict with the decisionss of other circuits. Besides, the questions decided by the Circuit Court are not *important* or unusual questions. As to Counts I, II and IV they involved well settled principles of insurance contract law. As to Count III the question decided was simply that there was insufficient evidence to submit the case to a jury. The decision of the Circuit Court of Appeals, whether from the standpoint of result or precedent, is isolated, and involves no principle the settlement of which is of importance to the public as distinguished from that of the parties and hence furnishes no basis for the granting of the writ of certiorari under Section 5 (b) of Rule 38. Lane & Bowler Corp. vs. Western Well Works, 261 U. S. 387, 393, 67 L. Ed. 712 714. It is not probable that the facts will again be duplicated, and basically petitioner is asking this Court to review and weigh the facts. Time and again this Court has held that the granting of the writ is not warranted merely to review the evidence or inferences drawn from it. To cite a few instances: General Talking Pictures Corporation vs. Western Electric Company, Inc., 304 U. S. 175, 178, 58 S. Ct. 849, 82 L. Ed. 1273; United States vs. Johnston, 268 U. S. 220,, 45 S. Ct. 496, 69 L. Ed. 925; Southern Power Co. vs. North Carolina Public Service Co. et al, 263 U. S. 508, 44

S. Ct. 164, 68 L. Ed. 413. We therefore submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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